

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

LT. GEN SCOTT A. SPELLMON, et al.,

Defendants,

and

AMERICAN GAS ASSOCIATION, et al.,

Defendant-Intervenors,

and

STATE OF MONTANA,

Plaintiff,

Civil Docket
No. CV-21-47-GF-BMM

Transcript of Motion Hearing

Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, MT 59404
Thursday, June 9, 2022
2:37 p.m. to 4:37 p.m.

BEFORE THE HONORABLE BRIAN MORRIS

UNITED STATES CHIEF DISTRICT COURT JUDGE

Yvette Heinze, RPR, CSR
United States Court Reporter
Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, MT 59404
yvette_heinze@mt.uscourts.gov
(406) 454-7805

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

APPEARANCES

PRESENT ON BEHALF OF THE PLAINTIFFS:

Douglas Hayes (in person)
SIERRA CLUB
1650 38th Street, Suite 102W
Boulder, CO 80301

Jared Michael Margolis (in person)
CENTER FOR BIOLOGICAL DIVERSITY
2852 Willamette St. #171
Eugene, OR 97405

Timothy Bechtold (in person)
BECHTOLD LAW FIRM
PO Box 7051
Missoula, MT 59807-7051

PRESENT ON BEHALF OF THE DEFENDANT,
FEDERAL DEFENDERS:

Coby Howell (in person)
Melonnie Casner (in person)
OFFICE OF THE U.S. ATTORNEY
1000 SW Third Ave, Suite 600
Portland, OR 97204-2024

PRESENT ON BEHALF OF THE DEFENDANT,
US ARMY CORPS OF ENGINEERS:

Kristofor R. Swanson (via video)
Benjamin Grillot (via video)
U.S. DEPARTMENT OF JUSTICE
ENVIRONMENTAL & NATURAL RESOURCES DIVISION-NRS
P.O. Box 7611
Washington, DC 20044-7611

1 PRESENT ON BEHALF OF THE DEFENDANT,
2 INTERVENOR-DEFENDANT STATE OF MONTANA:

3 Kathleen L. Smithgall (via video)
4 MONTANA DEPARTMENT OF JUSTICE
5 215 North Sanders
6 PO Box 201401
7 Helena, MT 59620-1401

8 PRESENT ON BEHALF OF DEFENDANT,
9 INTERVENOR-DEFENDANTS AMERICAN GAS ASSOCIATION, AMERICAN
10 PETROLEUM INSTITUTE, AMERICAN PUBLIC GAS ASSOCIATION,
11 ASSOCIATION OF OIL PIPE LINES, AND INTERSTATE NATURAL GAS
12 ASSOCIATION OF AMERICA:

13 Brianne C. McClafferty (in person)
14 HOLLAND & HART - BILLINGS
15 401 North 31st Street, Suite 1500
16 Billings, MT 59101-1277

17 Karma B. Brown (via video)
18 HUNTON ANDREWS KURTH LLP
19 2200 Pennsylvania Avenue, NW
20 Washington, DC 20037

21 PRESENT ON BEHALF OF DEFENDANT,
22 AMICUS PARTY CHAMBER OF COMMERCE OF THE UNITED STATES OF
23 AMERICA:

24 Rachel H. Parkin (via video)
25 MILODRAGOVICH DALE STEINBRENNER
620 High Park Way
PO Box 4947
Missoula, MT 59806-4947

Brandon M. Tuck (via video)
VINSON & ELKINS LLP
845 Texas Avenue, Suite 4700
Houston, TX 77002

Corinne Snow (via video)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW, Suite 500w
Washington, DC 20037

PROCEEDINGS

(Open court.)

THE COURT: Madam Clerk, please call the next case on the Court's calendar.

THE CLERK: This Court will now conduct a motion hearing in Cause Number CV-21-47-GF-BMM, Center for Biological Diversity, et al., versus Spellmon, et al.

THE COURT: Good afternoon, Mr. Margolis, Mr. Hayes, Mr. Bechtold.

MR. MARGOLIS: Good afternoon.

MR. HAYES: Good afternoon, Your Honor.

MR. BECHTOLD: Good afternoon.

THE COURT: Good afternoon, Mr. Howell, Ms. Casner, Ms. McClafferty. Nice to see you.

MS. McCLAFFERTY: Good afternoon, Your Honor.

THE COURT: And I see we're joined by a group of people on Zoom.

Would you please introduce yourselves for the record and also identify whom you represent, starting with Ms. Brown.

MS. BROWN: Good afternoon, Your Honor. This is Karma Brown from Hunton Andrews Kurth, and I represent the Nationwide Permit 12 Coalition, along with Ms. McClafferty.

THE COURT: All right. Thank you.

Who's next?

MR. GRILLLOT: Good afternoon, Your Honor. This is

02:38:45PM 1 Ben Grillo representing the federal defendants for the
02:38:45PM 2 Department of Justice.

02:38:47PM 3 THE COURT: All right. How about Ms. Parkin?

02:38:54PM 4 MS. PARKIN: Thank you, Your Honor. This is
02:38:54PM 5 Rachel Parkin with Milodragovich Dale Steinbrenner, here on
02:38:59PM 6 behalf of amicus, the Chamber of Commerce of the United States
02:39:02PM 7 of America.

02:39:02PM 8 THE COURT: Thank you.

02:39:02PM 9 Ms. Snow.

02:39:07PM 10 MS. SNOW: Good afternoon, Your Honor. This is
02:39:08PM 11 Corinne Snow. Joining me here in the room is Brandon Tuck.
02:39:09PM 12 We're both with Vinson & Elkins, representing the United States
02:39:12PM 13 Chamber of Commerce.

02:39:13PM 14 THE COURT: Ms. Smithgall.

02:39:16PM 15 MS. SMITHGALL: Good afternoon, Your Honor. My name
02:39:17PM 16 is Kathleen Smithgall, and I represent the State of Montana.

02:39:20PM 17 THE COURT: Are you with the Attorney General's
02:39:24PM 18 Office?

02:39:24PM 19 MS. SMITHGALL: Yes, Your Honor.

02:39:24PM 20 THE COURT: All right. Mr. Swanson.

02:39:29PM 21 MR. SWANSON: Good afternoon, Your Honor,
02:39:31PM 22 Kristofor Swanson, also on behalf of the federal defendants.

02:39:33PM 23 THE COURT: All right. Thank you.

02:39:33PM 24 So who's going to argue for plaintiffs?

02:39:37PM 25 MR. BECHTOLD: Mr. Margolis and Mr. Hayes will argue

02:39:39PM 1 for the plaintiffs, Your Honor.

02:39:40PM 2 THE COURT: All right. Thank you.

02:39:40PM 3 And for defendants?

02:39:42PM 4 MR. HOWELL: Your Honor, Coby Howell. I'll be
02:39:45PM 5 handling the ESA.

02:39:45PM 6 THE COURT: Okay.

02:39:47PM 7 MR. HOWELL: Mr. Grillot will be on the Clean Water
02:39:50PM 8 Act, and Mr. Swanson will be handling the NEPA portion.

02:39:56PM 9 THE COURT: All right. Thank you.

02:39:58PM 10 So to focus the argument just a bit, the main issues
02:40:04PM 11 as I see them, for plaintiffs first, are demonstrating how you
02:40:08PM 12 have standing and, if you clear that hurdle, establishing why
02:40:14PM 13 the District of Montana would be the appropriate venue for this
02:40:17PM 14 action.

02:40:18PM 15 For the defendants, I think the question is, well,
02:40:23PM 16 why is this any different than the last time you were here in
02:40:26PM 17 2017? Did you undertake the consultation that the Court
02:40:30PM 18 directed since that time? And if you did not, why? And why
02:40:35PM 19 doesn't that put us in the same position we were at back in
02:40:39PM 20 2017?

02:40:39PM 21 So let's start with Mr. Margolis.

02:40:47PM 22 MR. MARGOLIS: Good afternoon, Your Honor, and may it
02:40:49PM 23 please the Court. If you would like, I can get right to the
02:40:52PM 24 standing question. I did have some opening comments about
02:40:56PM 25 Nationwide Permit 12 and your prior rulings, but if you'd like

02:40:58PM 1 me to jump right into standing, I can.

02:40:59PM 2 THE COURT: Go ahead. Make your opening comments and
02:41:02PM 3 then get to the standing.

02:41:02PM 4 MR. MARGOLIS: Okay. As you said, this Court
02:41:03PM 5 previously ruled that the Corps violated the Endangered Species
02:41:03PM 6 Act by failing to consult when it reissued Nationwide
02:41:13PM 7 Permit 12. And the Corps, as you stated, did not -- they
02:41:15PM 8 ignored your declaratory ruling and remand which were not
02:41:19PM 9 disturbed on motions for stay pending appeal, and they reissued
02:41:22PM 10 the permit without doing the consultation that was required
02:41:24PM 11 based on the exact same legal reasoning that this Court had
02:41:27PM 12 rejected.

02:41:29PM 13 I will shorten this by turning your attention real
02:41:31PM 14 quick to the case that we just provided in supplemental notice
02:41:35PM 15 to the Court, which was the *Environmental Defense Center v*
02:41:39PM 16 *Bureau of Ocean Energy* because it really resolves many of the
02:41:41PM 17 central issues in this case.

02:41:43PM 18 In that case, which involved an environmental
02:41:47PM 19 assessment regarding the fracking of offshore oil, the Bureau
02:41:52PM 20 there had argued that Section 7 of the ESA did not apply
02:41:56PM 21 because the EA there was a decision support tool for future
02:42:00PM 22 proposals but did not approve actions absent further
02:42:05PM 23 project-specific review, much like the situation that we're
02:42:07PM 24 dealing with here.

02:42:08PM 25 And the court there, the Ninth Circuit court,

specifically found that site-specific review cannot cure a failure to consult at the programmatic level. It found where, otherwise, a listed species could be gradually destroyed so long as each step on the path to destruction is sufficiently modest. And that is in -- that is consistent with your decision in the prior case, which found that programmatic review of Nationwide Permit 12 is necessary to avoid piecemeal destruction of species and habitat.

So the Ninth Circuit decision in this case leaves no doubt that the defendants' position in this case now, is simply wrong.

I do want to turn now to standing because, as you said, that's the main issue that we need to deal with here.

First all, defendants' standing arguments, much like their "no effect" determination, are predicated on the exact same erroneous legal position that this Court previously rejected. They argue that there's no injury in fact because there's no harm to listed species from Nationwide Permit 12 due to General Condition 18, which requires project-specific review for Nationwide Permit 12 projects.

Even if this Court had not already made the determination that Nationwide Permit 12 does not adversely affect listed species, the Court must accept as valid the merits of the legal claims. The Supreme Court actually just reiterated that in *Federal Election Commission v Ted Cruz*.

1 So the Court must accept for standing purposes that
2 the Corps failed to ensure against jeopardy through
3 consultation on the program as the ESA requires. And therein
4 lies the basis for plaintiffs' standing. Plaintiffs have a
5 cognizable interest in protecting endangered species from
6 Nationwide Permit 12 activities. And the program certainly
7 meets the low "may affect" threshold for Section 7
8 consultation, as Your Honor has previously held.

9 THE COURT: Mr. Margolis --

10 MR. MARGOLIS: Yes.

11 THE COURT: -- as I recall in the last case you
12 brought -- or the last case the plaintiffs brought on this
13 issue, they identified specific species that were at risk with
14 regard to the proposed pipeline in Montana, and it included, I
15 believe, the pallet sturgeon and a type of beetle.

16 Do you have anything similar in this case?

17 MR. MARGOLIS: Well, yes. This case concerns --
18 first of all, it's a different case. That case was about
19 Keystone XL, initially. And this case is procedurally a little
20 bit different. This case concerns a procedural ESA violation
21 for a programmatic review that must be done before the program
22 is implemented through site-specific projects.

23 And we discussed in our briefing the applicable
24 Ninth Circuit case law from *Kraayenbrink* and other cases, which
25 state that for a procedural injury the plaintiff need only

02:44:44PM 1 establish that the agency violated the procedural rules
02:44:48PM 2 designed to protect their interests and that the challenged
02:44:50PM 3 action will threaten those interests, and we've established
02:44:52PM 4 that through declaration.

02:44:54PM 5 So, for example, the first Hamel declaration talked
02:44:57PM 6 about impacts to protected sturgeon from Nationwide Permit 12
02:45:02PM 7 activities through sedimentation and oil spills and explained
02:45:02PM 8 how those affect his academic and aesthetic interests.

02:45:06PM 9 And the first Hartl declaration, at paragraphs 27 to
02:45:10PM 10 29, discussed impacts to listed species from Nationwide
02:45:13PM 11 Permit 12 through habitat loss and contamination from oil
02:45:16PM 12 spills, which harm his interests.

02:45:17PM 13 And so our position is consistent with the
02:45:21PM 14 Supreme Court's decision in *Summers*. But I want to be clear
02:45:24PM 15 about one thing. *Summers* did not contemplate the circumstances
02:45:26PM 16 here, and this goes to what you were just asking me. Cases
02:45:29PM 17 like *Summers* and *Kraayenbrink*, they dealt with specific --
02:45:32PM 18 regulations that were specific to identified areas, such as
02:45:35PM 19 grazing and BLM lands or salvage on forest service lands, where
02:45:40PM 20 the plaintiffs had the opportunity to identify areas subject to
02:45:43PM 21 those regulations that affected their interests at the outset.

02:45:46PM 22 But, here, Nationwide Permit 12 is not limited to any
02:45:49PM 23 specific area. It can be used in any jurisdictional waterway
02:45:52PM 24 across the United States. And there's no way of knowing at the
02:45:54PM 25 outset, at this preliminary stage, where it will be used.

02:45:57PM 1 But regardless, consistent with *Summers*, we've
02:46:00PM 2 established a geographic nexus. And the Ninth Circuit has made
02:46:03PM 3 clear that that nexus can be broad.

02:46:04PM 4 For example, in *National Family Farm*, the declaration
02:46:08PM 5 there that established standing stated that the declarant --
02:46:12PM 6 that the pesticide approved was approved in the state where the
02:46:15PM 7 declarant lived, and the state -- and the declarant had an
02:46:19PM 8 interest in observing listed species in that state. And so
02:46:22PM 9 that's a general -- a broad geographic nexus that showed where
02:46:26PM 10 the activity applied to.

02:46:28PM 11 The same thing applies here. We've shown a
02:46:30PM 12 geographic nexus with specific examples, including rivers with
02:46:34PM 13 listed sturgeon that are likely to be affected by Nationwide
02:46:37PM 14 Permit 12 activities. And we reaffirm that in supplemental
02:46:41PM 15 declarations that showed specific examples of activities that
02:46:45PM 16 are approved by Nationwide Permit 12 that affect our interests.

02:46:52PM 17 And so those supplemental declarations, they show,
02:46:54PM 18 for example, the Hamel declaration, the second declaration. It
02:46:57PM 19 talked about the Pamplico pipeline, which implicates critical
02:47:15PM 20 habitat for endangered sturgeon in the Great Pee Dee River in
02:47:17PM 21 South Carolina.

02:47:18PM 22 THE COURT: That's starting to slide over into venue.
02:47:21PM 23 If you've got dangerous species in South Carolina, why isn't
02:47:26PM 24 the suit brought in South Carolina?

02:47:27PM 25 MR. MARGOLIS: Well, there shouldn't even really be

02:47:28PM 1 an issue about venue in this case, Your Honor. Defendants have
02:47:30PM 2 waived any argument as to venue. They never filed a motion to
02:47:32PM 3 dismiss regarding venue. They didn't argue it in their motion
02:47:35PM 4 for summary judgment. So it's waived.

02:47:37PM 5 They even cited in their own arguments, *Independent*
02:47:40PM 6 *Towers of Washington v Washington*, the Ninth Circuit case from
02:47:44PM 7 2003, that said the Court will not consider any claims that
02:47:46PM 8 were not actually argued in the appellant's opening brief.

02:47:50PM 9 Moreover, in the answer to our complaint, which is
02:47:54PM 10 ECF Number 28, paragraph 17, they admitted that venue was
02:47:58PM 11 proper in this district. And so they should be estopped from
02:48:01PM 12 making any argument as to venue.

02:48:03PM 13 But, regardless, it's not clear what they're asking
02:48:06PM 14 for. Are they asking for claim splitting? Your Honor has
02:48:08PM 15 already found that the NEPA and Clean Water Act and Endangered
02:48:12PM 16 Species Act claims are intertwined. So what would be the
02:48:13PM 17 purpose of claim splitting here?

02:48:16PM 18 So we believe that the venue argument has been
02:48:17PM 19 waived, and they should be estopped from arguing venue, and
02:48:20PM 20 there's no purpose in making a venue determination in this case
02:48:24PM 21 at this time.

02:48:26PM 22 Now, I want to go back to the specifics that we've
02:48:30PM 23 provided regarding standing. Before I get there, let's be
02:48:39PM 24 clear. Okay. For this procedural injury, the Ninth Circuit in
02:48:43PM 25 *Environmental Defense Center* specifically found that for claims

02:48:45PM 1 of procedural injury, the need for factual development ceases
02:48:48PM 2 when the alleged procedural injury or procedural violation is
02:48:52PM 3 complete.

02:48:53PM 4 We're talking -- at this stage we don't need to show
02:48:55PM 5 more than what we've already shown, which is that our interests
02:48:59PM 6 are affected by the failure to consult. And this is consistent
02:49:02PM 7 with the Supreme Court's decision in *Ohio Forestry* and the
02:49:05PM 8 Ninth Circuit's decision in *Kraayenbrink*, which found that
02:49:07PM 9 programmatic challenges are ripe when the programmatic decision
02:49:10PM 10 is made.

02:49:12PM 11 Importantly here, it's very difficult for the
02:49:15PM 12 plaintiffs to determine where Nationwide Permit 12 is being
02:49:17PM 13 used because the Army Corps doesn't make any information public
02:49:19PM 14 as to where it's being used. So we need to dig around and try
02:49:23PM 15 to find these examples, which we have provided consistent with
02:49:25PM 16 *Summers*. These examples of --

02:49:26PM 17 THE COURT: Counsel, let me slow you down for a
02:49:29PM 18 second.

02:49:29PM 19 How do you respond to the defendants' argument, well,
02:49:32PM 20 that's what the PCNs are for? That gives you sufficient time
02:49:36PM 21 to -- you know, the public construction notices -- give you
02:49:42PM 22 time to identify potential endangered species that might be
02:49:46PM 23 impacted by a project and bring an action then, if necessary.

02:49:51PM 24 MR. MARGOLIS: I don't believe they've made that
02:49:51PM 25 argument, nor could they, because the preconstruction

02:49:52PM 1 notifications are not made public. There's no way for those
02:49:55PM 2 to -- for us to access those, absent a FOIA request, which we
02:49:59PM 3 have made.

02:49:59PM 4 And we actually have an argument we presented in a
02:50:03PM 5 footnote in one of our briefs that explain that we made a FOIA
02:50:06PM 6 request to try to obtain preconstruction notifications, and so
02:50:09PM 7 far have not been provided with any of those.

02:50:11PM 8 So they can't make an argument that we have this
02:50:14PM 9 information and that it's public because it is not.

02:50:19PM 10 Importantly here, the harm to listed species is not
02:50:23PM 11 hypothetical, and we're not relying on statistical probability
02:50:26PM 12 that some harm might occur. The Corps admits that thousands of
02:50:29PM 13 Nationwide Permit 12 authorized activities may affect listed
02:50:33PM 14 species and require a consultation. So it's inevitable that
02:50:36PM 15 our interests are affected.

02:50:37PM 16 THE COURT: The Courts required consultation, I
02:50:39PM 17 believe, in 2007 and 2012. Why is it required every time? Is
02:50:48PM 18 that the new normal now? Because up until -- from '77 to 2007,
02:50:54PM 19 there was no consultation.

02:50:55PM 20 MR. MARGOLIS: They did do voluntary consultation
02:50:57PM 21 previously with the National Marine Fishery Service.

02:51:01PM 22 Importantly, the 2012 consultation, you know,
02:51:03PM 23 resulted in a jeopardy determination that in 2014 was changed
02:51:09PM 24 based on the implementation of protections at that national
02:51:12PM 25 level.

1 But, importantly, they never consulted with the Fish
2 & Wildlife Service. That was only with the National Marine
3 Fishery Service. Plus, they haven't consulted since the 2014,
4 a programmatic biological opinion. So it's not clear that the
5 mechanisms that were put in place in 2014 are even working to
6 protect listed species.

7 So at this point, there's no way for us to know if
8 listed species are continuing to be jeopardized as the National
9 Marine Fishery Service found in 2012. And more species are
10 affected by Nationwide Permit 12 activities that are within
11 Fish & Wildlife's jurisdiction than NMFS's jurisdiction --

12 (Clarification requested by stenographer.)

13 MR. MARGOLIS: National Marine Fishery Service. And
14 I am fast. I apologize. I'm a New Yorker. It's hard not to
15 talk fast.

16 As I was saying, the harm to listed species here is
17 not hypothetical. The Corps' own decision document makes it
18 clear that there's a substantial risk that harm will occur, and
19 that's a standard from the Supreme Court decision in *Clapper v*
20 *Amnesty International*.

21 The record shows that Nationwide Permit 12 activities
22 alter stream morphology, resulting in increases in sediments
23 and pollutants in the water. That can be found in the record
24 at NWP 1037 to 1040. And the Court concluded that Nationwide
25 Permit 12 activities result in adverse affects to wildlife,

1 including the destruction of aquatic habitat, and that can be
2 found at NWP 1062.

3 Importantly, defendants' argument that plaintiffs can
4 never meet *Summer's* hard floor is predicated on a complete
5 mischaracterization of Section 7. They claim that no amount of
6 investigation will produce an example of authorized injury in
7 fact because under the permit there cannot be one, but that is
8 not how the ESA works.

9 Project-specific review still allows for harm to
10 listed species through incidental take, which can occur from
11 direct harm and habitat modification. Those are the small cuts
12 that add up to death by a thousand small cuts.

13 And as Your Honor previously ruled, their position is
14 entirely inconsistent with the regulations. The ESA requires
15 consultation on programs, and that the agency consider the
16 effects of the action as a whole but does not provide for that
17 take authorization to occur at the programmatic level.

18 50 CFR 402.14(i)(6) specifically says that take
19 authorization must be addressed through subsequent Section 7
20 consultation on projects implementing the program. So the
21 regulations contemplate that while programs themselves might
22 not have direct effects -- it's the projects that have the
23 direct effects -- programmatic consultation is still required.

24 And that was confirmed by the Ninth Circuit in the
25 recent *Environmental Defense Center* case where the Court

02:53:48PM 1 specifically rejected the argument that the ESA did not apply
02:53:52PM 2 to programmatic documents that themselves did not mandate any
02:53:55PM 3 action citing Pacific Rivers Council. Again, leaving no doubt
02:53:59PM 4 that the defendants are wrong on that point.

02:54:00PM 5 And defendants' position would render the requirement
02:54:03PM 6 to consult on programs meaningless. They're asking you to do
02:54:06PM 7 away with consultation on programs because they always require
02:54:10PM 8 consultation on the projects that are implementing the
02:54:13PM 9 programs. So project-specific review cannot negate the need to
02:54:18PM 10 consult on the program as the ESA requires.

02:54:21PM 11 Programmatic consultation is vital as the services
02:54:24PM 12 have found in the preamble to the regulations on programmatic
02:54:28PM 13 consultation, that it allows for a broad-scale examination
02:54:32PM 14 that's not as readily conducted through subsequent
02:54:33PM 15 project-specific consultations.

02:54:35PM 16 Importantly, plaintiffs' position does not hinge on
02:54:38PM 17 noncompliance with Nationwide Permit 12 as the defendants
02:54:41PM 18 allege. I want to make this clear because they said this a few
02:54:44PM 19 times. Nationwide Permit 12, because it will be used thousands
02:54:48PM 20 of times, even when it's used lawfully and that
02:54:50PM 21 project-specific consultation does occur, the program has
02:54:53PM 22 impacts to listed species that must be reviewed at that
02:54:56PM 23 programmatic level.

02:54:57PM 24 And, again, we show through specific Nationwide
02:55:02PM 25 Permit 12 projects in our supplemental declarations, including

the Hamel declaration, discussing that Pamplico pipeline, and the second Hartl declaration, discussing the Bullitt pipeline in Kentucky that were adversely affected by specific projects.

The defendants have argued that those supplemental declarations are not properly before the Court. So I want to address that real quick.

They're certainly properly before the Court. They were submitted in response to defendants' arguments, not on reply but in opposition. It's something that's not uncommon. I would turn your attention to a DC Circuit case from 2021 that discusses this. *National Council for Adoption v Blinken* discusses -- which is 4 F.4th 106 -- discusses how courts allow supplemental standing declarations when they do not raise entirely new theories of standing. They just shore up the initial ones by providing more specifics. That's exactly what we did here. And, importantly, they had an opportunity to reply. So there's no prejudice to us having provided these supplemental declarations.

And the cases that they rely on are completely inapposite. The case *Lujan v National Wildlife Federation*, there, the plaintiffs tried to submit declarations after a standing hearing. And the Ninth Circuit said that the lower court had discretion to strike them, to reject them, but didn't say that they had to be rejected and, in fact, cited Rule 6(c) for the proposition that if they had been submitted before the

hearing, it would have been timely. Well, we don't have that same issue here at all.

And in *Zamani v. Carnes*, that was about arguments that were raised for the first time on reply. Again, we're not raising new standing arguments on reply. We're simply submitting information to buttress what we've already provided.

We believe we had standing when the complaint was filed, providing evidence supporting that along the way, through allegations submitted in standing declarations, is acceptable. And it's not clear exactly what they want here, what the defendants want. Should we dismiss this case and refile it now that we have examples? That would make no sense. It would be inefficient. We've provided examples consistent with *Summers*, and so we believe we've shown standing in this case.

Now, one last thing on procedural standing. When challenging a programmatic action, once the plaintiffs have shown that they have standing because that programmatic action, like a regulation, affects their interest, that standing has not been limited to the specific locations identified in the standing declarations, as the defendants have attempted to argue.

So while plaintiffs are unable to identify all the locations where program -- where this program will be implemented through projects, particularly here, since the

02:57:40PM 1 Corps doesn't make that information public -- we've provided
02:57:42PM 2 sufficient specificity by pointing to specific Nationwide
02:57:46PM 3 Permit 12 projects and to specific harm in waters that are
02:57:49PM 4 affected or likely to be affected by Nationwide Permit 12
02:57:52PM 5 activities to challenge Nationwide Permit 12 as a whole.

02:57:56PM 6 Under the defendants' theory, the plaintiffs would
02:57:58PM 7 never be able to challenge the programmatic action, only
02:58:00PM 8 projects. But the Ninth Circuit has made clear, post-*Summers*,
02:58:03PM 9 that that is not the case.

02:58:07PM 10 *WildEarth Guardians v United States Department of*
02:58:09PM 11 *Agriculture*, which is 795 F.3d 1148, from 2015, that dealt with
02:58:14PM 12 a programmatic EIS, which was the basis for further
02:58:17PM 13 project-specific actions, much like what we're dealing with
02:58:20PM 14 here. And in ruling that the plaintiff had standing to sue
02:58:22PM 15 over the programmatic review, the Court held that the challenge
02:58:25PM 16 to the programmatic action did not require the plaintiff to
02:58:27PM 17 show standing for all the specific actions taken under that
02:58:30PM 18 program. The Court specifically said that the PEIS also
02:58:35PM 19 applies to other geographic regions that the declarant does not
02:58:39PM 20 visit is irrelevant to the standing analysis.

02:58:40PM 21 And the same is true from *National Family Farm*, and
02:58:43PM 22 standing there was based on a declaration stating that
02:58:46PM 23 pesticide was approved in the state where the declarant lived.
02:58:49PM 24 But standing then was not limited to that state. The
02:58:51PM 25 standing -- the plaintiffs had standing to challenge EPA's

02:58:56PM 1 registration of the pesticide nationwide, and the same should
02:58:56PM 2 apply here.

02:58:57PM 3 We're challenging Nationwide Permit 12 as a whole,
02:59:00PM 4 not specific projects. We've provided examples of specific
02:59:03PM 5 projects to show that we are directly affected, but our
02:59:05PM 6 challenge here is to Nationwide Permit 12 as a whole.

02:59:09PM 7 If the Court has no further questions about the
02:59:12PM 8 procedural standing, I'd like to turn to *Havens* organizational
02:59:15PM 9 standing.

02:59:16PM 10 THE COURT: Well, let's focus again on -- one of the
02:59:21PM 11 arguments the defendants make is the creation of the nationwide
02:59:28PM 12 permit instills great discretion upon the Corps; they're
02:59:33PM 13 instructed as the agency in charge to fill in the gaps. And
02:59:38PM 14 you're kind of preempting that process by trying to make them
02:59:41PM 15 come up with a list of potential harms before they have even
02:59:45PM 16 had a chance to evaluate what might be potential harms because
02:59:48PM 17 we don't know where the construction projects will be.

02:59:51PM 18 How do you respond?

02:59:52PM 19 MR. MARGOLIS: That's not the purpose of programmatic
02:59:53PM 20 review, and that's why there's this two-step analysis created
02:59:57PM 21 under the Endangered Species Act regulations. We're not asking
02:59:59PM 22 them to try to figure out exactly where Nationwide Permit 12
03:00:02PM 23 will be used.

03:00:03PM 24 Programmatic review, as the Fish & Wildlife Service
03:00:08PM 25 and National Marine Fishery Services have said, is intended to

03:00:10PM 1 ensure that there are mechanisms in place to track the impacts
03:00:12PM 2 as that program is carried out to ensure that the aggregate
03:00:16PM 3 impacts of the program do not result in jeopardy.

03:00:18PM 4 THE COURT: How does that work in this case?

03:00:20PM 5 MR. MARGOLIS: It will work exactly as they did
03:00:22PM 6 previously in their prior consultations with NMFS where they
03:00:24PM 7 look at how they can track the impacts of the entire program to
03:00:29PM 8 make sure that it's not causing death by a thousand small cuts,
03:00:32PM 9 as we've said, and whether there are mechanisms that need to be
03:00:34PM 10 in place to ensure against jeopardy.

03:00:37PM 11 So, for example, we talked about the -- them relying
03:00:42PM 12 on permit applicants, the delegation to permit applicants to
03:00:46PM 13 provide them with information as to whether projects may affect
03:00:49PM 14 listed species, which we think is a violation of the Endangered
03:00:49PM 15 Species Act.

03:00:54PM 16 As we've said, programmatic consultation might result
03:00:58PM 17 in mechanisms put in place to ensure that that does not occur,
03:01:00PM 18 that project-specific consultation always does occur. And
03:01:04PM 19 there are other mechanisms that can be put in place. Again,
03:01:06PM 20 it's about tracking the impacts on listed species.

03:01:09PM 21 Right now, they don't have mechanisms in place.
03:01:10PM 22 National Marine Fishery Service has been very adamant about
03:01:13PM 23 this, in the prior consultations that they did, that they did
03:01:17PM 24 not have mechanisms in place to track the overall impacts of
03:01:19PM 25 the program. And that's what the programmatic consultation is

03:01:22PM 1 intended to do.

03:01:23PM 2 We're not asking them to come up with a list of
03:01:25PM 3 activities that would occur. We're asking them to consider how
03:01:28PM 4 to ensure that the program itself does not result in jeopardy
03:01:32PM 5 through mechanisms at that national level.

03:01:34PM 6 Again, the prior consultations with NMFS show exactly
03:01:38PM 7 how that took place, what was implemented, and we provide that
03:01:41PM 8 in our briefing, discussions of exactly what the National
03:01:45PM 9 Marine Fishery Services required.

03:01:51PM 10 Are there any further questions on the procedural
03:01:53PM 11 standing?

03:01:53PM 12 THE COURT: No, go ahead.

03:01:54PM 13 MR. MARGOLIS: The plaintiffs have also shown *Havens*
03:01:58PM 14 organizational standing in this case, and this case fits
03:02:01PM 15 perfectly with *Havens* because, here, the Corps set up
03:02:04PM 16 Nationwide Permit 12 in such a way as to require us to take it
03:02:06PM 17 upon ourselves to find out about the program and its impacts,
03:02:10PM 18 to uncover how it is being applied. They purposely hide the
03:02:14PM 19 information with no public access, no public accountability,
03:02:17PM 20 which puts the onus on the public to ferret out how Nationwide
03:02:20PM 21 Permit 12 is being used.

03:02:21PM 22 And having set up the system in that way, they can't
03:02:25PM 23 then argue that we don't need to use our own resources to
03:02:25PM 24 protect our interests, which is the basis for *Havens*
03:02:28PM 25 organizational standing.

1 The defendants' attempt to narrow *Havens* to
2 situations where plaintiffs are unable to function as an
3 organization, citing a concurring and dissenting opinion from
4 *Fair Housing Council of San Fernando Valley v Roommate.com*.
5 But that is not what the law says. The majority opinion there,
6 the Court stated that the plaintiffs had organizational
7 standing where the agency's conduct caused the plaintiff to
8 divert resources independent of litigation costs, which
9 frustrated the central mission of the organization.

10 And in that case, the plaintiff, as the Court noted,
11 investigated the defendant's alleged violations and, in
12 response, started new education and outreach campaigns.
13 Because that was not part of litigation, that frustrated the
14 central mission, and the plaintiffs had organizational
15 standing.

16 And the same applies here. We've shown that the
17 Corps' failure to consult did not allow the plaintiffs to go
18 about their business as usual, as the government claims. The
19 plaintiffs diverted resources trying to protect their members'
20 interests, which takes away from our other work. That's the
21 frustration of our mission.

22 It's not based on having to litigate. It's based on
23 tracking Nationwide Permit 12 activities, making FOIA requests,
24 reviewing those requests, if we get them, and education
25 campaigns that have resulted in thousands of comments being

03:03:42PM 1 provided on Nationwide Permit 12 from our members.

03:03:47PM 2 Importantly, *Havens* is not about -- we talked about
03:03:50PM 3 information. It's not an informational injury. So, in
03:03:53PM 4 response, the government talks about informational injury.
03:03:55PM 5 This is not an informational injury claim. It's depriving us
03:03:59PM 6 of key information that we rely on to fulfill our mission.
03:04:02PM 7 That's why the lack of information provides *Havens*
03:04:06PM 8 organizational standing.

03:04:11PM 9 Do you have any questions about *Havens* organizational
03:04:13PM 10 standing, Your Honor?

03:04:13PM 11 THE COURT: No.

03:04:13PM 12 MR. MARGOLIS: I just want to point out one more
03:04:19PM 13 thing on the merits before I turn this over to my cocounsel to
03:04:22PM 14 talk about NEPA and the Clean Water Act, which is this reliance
03:04:27PM 15 on permittee compliance to implement mitigation measures that
03:04:32PM 16 the government has pointed out from *National Family Farm* as a
03:04:36PM 17 reason why the delegation here was not unlawful.

03:04:40PM 18 I want to make sure this is clear. Reliance on
03:04:44PM 19 permittees to apply measures included in a permit, that's not
03:04:47PM 20 what we're dealing with here. Here, we're relying on
03:04:51PM 21 self-interested permittees to make the initial effects
03:04:54PM 22 determination. Right? If we're talking about a permit
03:04:58PM 23 compliance measure, the agency completes that permit.

03:05:01PM 24 But, here, at the initial effects determination, if
03:05:04PM 25 they fail to submit a preconstruction notification, the Corps

1 would never know. And that ties back into the need, again, for
2 programmatic consultation, but it also shows why the delegation
3 here -- it creates -- why the "may affect" standard is
4 satisfied. That level of delegation suggests that species may
5 be affected without consultation, as this Court previously
6 ruled, and they did not remedy that whatsoever since your prior
7 discussion -- prior ruling, rather.

8 We'll transition here to NEPA and the Clean Water
9 Act, but I just want to point out a fundamental disconnect in
10 how the Corps approaches the ESA and NEPA --

11 (Clarification requested by stenographer.)

12 MR. MARGOLIS: -- a fundamental disconnect on how
13 they approach the ESA and NEPA. For NEPA purposes, they do an
14 analysis at the programmatic level but don't do any
15 project-specific NEPA analysis.

16 They do the opposite for the Endangered Species Act,
17 where they do only project-specific review, ignoring the clear
18 requirement in the Endangered Species Act to consult on the
19 program itself.

20 It's not clear why they do it that way, but clearly
21 the NEPA analysis being done at the programmatic level shows
22 that they can undertake a programmatic analysis at the
23 Endangered Species Act level and choose not to based on this
24 erroneous legal argument that this Court has already rejected
25 and which is inconsistent with the Ninth Circuit's decision --

03:06:23PM 1 recent decision that we provided in the supplemental notice.

03:06:29PM 2 Regardless, the NEPA analysis was inadequate, and so
03:06:32PM 3 I'll turn it over to my cocounsel to discuss that.

03:06:33PM 4 THE COURT: All right. Thank you, Mr. Margolis.

03:06:33PM 5 MR. MARGOLIS: Thank you, Your Honor.

03:06:36PM 6 THE COURT: Mr. Hayes.

03:06:40PM 7 MR. HAYES: Good afternoon, Your Honor. Again,

03:06:49PM 8 Doug Hayes, on behalf of plaintiffs. I plan to address
03:06:52PM 9 plaintiffs' claims under the National Environmental Policy Act
03:06:55PM 10 and the Clean Water Act.

03:06:57PM 11 I'd like to start with NEPA. And at the outset, I
03:07:01PM 12 just want to make a couple general points. First, Nationwide
03:07:06PM 13 Permit 12 is the final permit authorizing the crossings of
03:07:09PM 14 waterways by pipelines throughout the United States for a
03:07:14PM 15 period of five years. There's often no further Corps
03:07:20PM 16 involvement at all. So this is the final permit itself.

03:07:24PM 17 The Army Corps has prepared this environmental
03:07:27PM 18 assessment for what they estimate to be about 47,000 water
03:07:32PM 19 crossings over a five-year period. And this is the only NEPA
03:07:36PM 20 analysis for those tens of thousands of activities. There's no
03:07:42PM 21 project-level review by the Corps or other agencies under NEPA.
03:07:48PM 22 So this is it.

03:07:49PM 23 Now, in discussing the NEPA claims, I'd like to sort
03:07:53PM 24 of divide it up into two categories. One, the three sort of
03:07:57PM 25 construction-related impacts that we discussed; and then I'd

1 like to turn to the oil spills and climate change issues after
2 that.

3 Now, the construction-related impacts involved
4 frac-outs, forested wetland clearing, and cumulative effects.
5 All three of these occur during construction while these
6 pipeline crossings are being constructed. All of these involve
7 adverse impacts to the waterways themselves. So we're not
8 talking about uplands or anything like that. And all three of
9 these plaintiffs submitted extensive information to the
10 Army Corps about the impacts to waterways which the Corps
11 completely ignored.

12 Now, with frac-outs, the first of these three, just
13 to recap, the frac-outs are when the pipelines are installed
14 under waterways using horizontal directional drilling, and the
15 pressurized fracking drilling fluid gets released through
16 fissures in the bedrock and releases into the waterways.

17 And I'd just like to point to three places in the
18 record that emphasizes the gravity of this issue. First of
19 all, Document 38-6, at page 8, it's an Army Corps document from
20 2020 where the Corps itself says this has become a critical
21 issue, and it says it poses grave risks to environmentally
22 sensitive areas.

23 Document 38-8, that plaintiffs provided, is a
24 discussion of an incident on the Rover pipeline in Ohio, in
25 2017, where two million gallons of drilling fluid contaminated

03:09:49PM 1 with diesel fuel was spilled into a pristine wetland and
03:09:51PM 2 covered it in 13 inches of drilling mud.

03:09:53PM 3 THE COURT: What's the page number?

03:09:58PM 4 MR. HAYES: That is page 26 of Document 38-8. It's
03:10:01PM 5 also in the record at NWP32566, I believe.

03:10:09PM 6 And then on page 19 of that same document, there's a
03:10:12PM 7 discussion of another pipeline, the Mariner East pipeline in
03:10:15PM 8 Pennsylvania, where there were at least -- this is a pipeline
03:10:18PM 9 that went across the state of Pennsylvania. There were at
03:10:21PM 10 least 125 separate frac-out incidents that released hundreds of
03:10:26PM 11 thousands of gallons, 40 percent of those impacted wetlands, 52
03:10:32PM 12 impacted streams.

03:10:33PM 13 So this is all information on the issue of frac-outs.
03:10:38PM 14 The Corps itself acknowledges in these documents that it poses
03:10:42PM 15 grave risk, and the Corps refused to analyze it. And it's all
03:10:46PM 16 based on their position that the Corps doesn't have to analyze
03:10:53PM 17 impacts that it doesn't directly regulate under NEPA. And
03:10:56PM 18 that's contrary to NEPA, based on several cases, including the
03:11:02PM 19 *Coalition to Protect Puget Sound* case from the Western District
03:11:07PM 20 of Washington, 2019.

03:11:08PM 21 The second construction-related impact I'd like to
03:11:13PM 22 discuss is forested wetland clearing. Again, this is when the
03:11:18PM 23 pipelines are constructed through these high-quality forested
03:11:23PM 24 wetlands, and they have to create a 50- to 100-foot wide
03:11:27PM 25 right-of-way and permanently maintain it, prevent anything from

03:11:31PM 1 growing back so that the pipeline can be maintained.

03:11:34PM 2 Again, plaintiffs submitted extensive information on
03:11:39PM 3 forested wetlands and the impacts from pipelines. And the
03:11:44PM 4 Corps, their position on forested wetlands clearing is a little
03:11:48PM 5 bit different. The EA actually acknowledges permanent adverse
03:11:53PM 6 effects and permanent loss of wetlands functions. But those
03:11:57PM 7 are the only two phrases they use. They refuse to go into any
03:12:01PM 8 further detail.

03:12:03PM 9 And as we know from several cases in the
03:12:08PM 10 Ninth Circuit, simply acknowledging adverse impacts is
03:12:13PM 11 insufficient. It fails to meet NEPA's hard look requirement --
03:12:16PM 12 or "hard look" mandate. The most recent case that we filed as
03:12:21PM 13 supplemental authority this week, *Environmental Defense Center*
03:12:25PM 14 *v Bureau of Ocean and Energy Management*, it talks about that as
03:12:29PM 15 well. It reaffirms that.

03:12:30PM 16 The third category of construction-related impacts is
03:12:35PM 17 the cumulative effects. So the Corps -- what the Corps did
03:12:41PM 18 with cumulative effects is include an eight-page national scale
03:12:48PM 19 analysis, and it's the same boilerplate analysis that they use
03:12:53PM 20 for every other nationwide permit. All 58 of them use the
03:12:57PM 21 same, quote/unquote, "national scale analysis." But it doesn't
03:13:02PM 22 even mention oil and gas pipelines or construction at all.

03:13:07PM 23 And, again, we're not talking about operation here.
03:13:11PM 24 We're talking about building the right-of-way, building the
03:13:17PM 25 pump stations, the access roads, the on-the-ground impacts from

03:13:20PM 1 construction, including stacking them in close proximity to
03:13:26PM 2 each other and so forth.

03:13:27PM 3 And so for all those construction-related impacts,
03:13:35PM 4 these are, you know, again, impact the waterways. They are
03:13:39PM 5 directly authorized by Nationwide Permit 12 itself, and the
03:13:43PM 6 Corps failed to meet NEPA's "hard look" standard.

03:13:46PM 7 I'd like to turn to the oil and gas spills now. Now,
03:13:53PM 8 there's a lot of discussion in the briefs about whether
03:13:57PM 9 Nationwide -- whether the Corps permits oil pipelines. So I
03:14:01PM 10 just want to put it this way: Nationwide Permit 12 authorizes
03:14:05PM 11 the crossings of US waters by oil and gas pipelines. There's
03:14:12PM 12 no dispute about that. The result of that action is that these
03:14:16PM 13 oil and gas pipelines are installed in the waterways in these
03:14:20PM 14 streams, rivers, wetlands. And the pipelines have a propensity
03:14:25PM 15 to leak, spill, rupture.

03:14:27PM 16 And so under the NEPA case law, it requires the
03:14:34PM 17 Corps -- it's a reasonably foreseeable impact to those
03:14:37PM 18 waterways themselves. So NEPA requires the Army Corps to
03:14:42PM 19 consider spills into the waterways from the oil and gas
03:14:46PM 20 pipelines.

03:14:47PM 21 Now, the Corps, again, refuses to look at the impacts
03:14:52PM 22 of spills because it says it doesn't have to look at impacts
03:14:58PM 23 that the Corps doesn't itself directly regulate. And that's
03:15:03PM 24 important here because the government in their brief tried to
03:15:06PM 25 distance themselves from that position.

03:15:08PM 1 So I want to point to the EA where they make that
03:15:11PM 2 determination. It's at NPW, page 952. They're talking about
03:15:19PM 3 a -- the EA explains that some commenters asked the Corps to
03:15:24PM 4 evaluate spills. And in response the Corps says, "Since the
03:15:28PM 5 Corps does not regulate the release of oil and natural gas, it
03:15:32PM 6 is not required to perform a detailed analysis of the effects
03:15:35PM 7 of those possible future leaks or spills."

03:15:39PM 8 So that is their position. That was their basis for
03:15:42PM 9 refusing to look at oil and gas spills. It wasn't based on a
03:15:48PM 10 scoping decision or a reasonable interpretation of their own
03:15:52PM 11 scoping regulations, as the briefs argue. That is their
03:15:58PM 12 position, and it's arbitrary and capricious. It's contrary to
03:16:03PM 13 NEPA, as the Ninth Circuit's held in *Ocean Advocates v US Army*
03:16:09PM 14 *Corps of Engineers*, *Sierra Club v Sigler*, Fifth Circuit case,
03:16:13PM 15 and *Standing Rock Sioux Tribe v Army Corps of Engineers*.

03:16:18PM 16 Now, admittedly, those are all individual permit
03:16:22PM 17 cases, and I want to address the distinction that the
03:16:26PM 18 government defendants make there. It's clear that all these
03:16:31PM 19 cases require the Army Corps to look at the impacts of oil
03:16:36PM 20 spills when issuing 404 permits, at least in the individual
03:16:39PM 21 permit context.

03:16:40PM 22 So the question becomes: Why are Nationwide
03:16:44PM 23 Permit 12 -- excuse me -- why are nationwide permits any
03:16:45PM 24 different? The defendants make that argument, but they can't
03:16:49PM 25 provide any legal basis for that position. And there really is

03:16:54PM 1 none. Individual permits, nationwide permits, are two
03:16:58PM 2 different provisions of Section 404. They're two different
03:17:01PM 3 types of permits that allow the Corps to authorize discharge
03:17:06PM 4 and fill of material for various projects. Under both
03:17:12PM 5 provisions, the Corps is authorizing the same thing, the
03:17:14PM 6 discharge and fill. Under both provisions, the Corps provides
03:17:19PM 7 the -- or excuse me -- applies the same regulations, the public
03:17:23PM 8 interest factors, at 33 CFR 320.4.

03:17:30PM 9 So, again, the defendants can't provide any legal
03:17:34PM 10 basis for this distinction that would allow the Corps to
03:17:40PM 11 disregard a whole category of impacts that they would be
03:17:44PM 12 required to look at under individual permits.

03:17:46PM 13 THE COURT: Counsel, what's the purpose of a
03:17:49PM 14 nationwide permit if we're going to subject the issuance of it
03:17:52PM 15 to all of the analysis and consultation you're seeking? Isn't
03:17:58PM 16 Congress' intent, "Well, there are a number of crossings at
03:18:01PM 17 waterways that likely would have a limited impact. So we're
03:18:04PM 18 going to group those all into one big permit"?

03:18:07PM 19 MR. HAYES: That's true. So, again, the Corps can
03:18:11PM 20 issue project by project 404 permits, or they can permit an
03:18:17PM 21 entire category of activities, which they have attempted to
03:18:21PM 22 do -- or which they have done here. But before doing so, they
03:18:26PM 23 have to evaluate the impacts of those activities under NEPA.
03:18:29PM 24 There's no question about that.

03:18:31PM 25 So what the government's position --

03:18:33PM 1 THE COURT: Does it have to be in the EIS, or can it
03:18:35PM 2 be in the EA?

03:18:39PM 3 MR. HAYES: Well, they -- the environment assessment
03:18:42PM 4 here -- we've argued that an EIS is required because it clearly
03:18:47PM 5 reaches the significance threshold.

03:18:48PM 6 But the EA -- the purpose of the EA is to make a
03:18:51PM 7 convincing case why an EIS isn't required. And the EA, you
03:18:58PM 8 know, has to meet NEPA's "hard look" mandate, and that means
03:19:00PM 9 looking at all the reasonably foreseeable effects.

03:19:03PM 10 So if the Army Corps -- let me put it this way: If
03:19:08PM 11 the Army Corps has to evaluate oil spills when issuing a single
03:19:13PM 12 permit, then how could it be that they could issue an entire --
03:19:18PM 13 a permit for an entire category of activities that won't have
03:19:23PM 14 any project-level review whatsoever and they can avoid
03:19:26PM 15 evaluating those same impacts that they have to do at the
03:19:28PM 16 project level?

03:19:29PM 17 You're right that a nationwide permit -- the purpose
03:19:32PM 18 is to perspective authorize an entire category of activities,
03:19:38PM 19 in this case, 47,000 oil and gas pipeline crossings. But
03:19:42PM 20 before doing so, they have to analyze the impacts of that under
03:19:44PM 21 NEPA and make a determination that the impacts are in fact
03:19:49PM 22 minimal, and that's what they've failed to do here.

03:19:52PM 23 Now, the government relies on the Supreme Court's
03:19:58PM 24 decision in *Public Citizen*, but that case is clearly
03:20:05PM 25 distinguishable. In *Public Citizen*, the agency -- no matter

03:20:08PM 1 what the agency did, they had no -- it had no authority to
03:20:14PM 2 affect the outcome. It couldn't stop these trucks from
03:20:17PM 3 operating in the United States.

03:20:20PM 4 Here, it's quite different. The Court clearly has
03:20:23PM 5 the authority and the obligation to not issue Nationwide
03:20:30PM 6 Permit 12 if it determines the impacts would be more than
03:20:34PM 7 minimal.

03:20:37PM 8 So it's in the statute. The public interest factors
03:20:39PM 9 that the Army Corps has to apply, again, are -- they're broad.
03:20:46PM 10 They talk about safety, general environmental concerns, water
03:20:50PM 11 quality, et cetera, and clearly leave room for the Corps to
03:20:53PM 12 look at the oil spill impacts into these waterways. And,
03:20:57PM 13 again, they have to decline to issue the nationwide permit if
03:21:01PM 14 they find the impacts would be more than minimal.

03:21:07PM 15 With the climate change claim, Your Honor, it's the
03:21:12PM 16 same analysis. The Corps refused to evaluate the greenhouse
03:21:20PM 17 gas implications of permitting all of these oil and gas
03:21:26PM 18 pipelines nationwide because they don't regulate the downstream
03:21:31PM 19 combustion of fossil fuels. That's the position -- again, it
03:21:33PM 20 was not a scoping decision. It wasn't an application of
03:21:37PM 21 their -- of the Army Corps's NEPA scoping regulations. In
03:21:44PM 22 fact, the government argues that those regulations don't even
03:21:47PM 23 apply here.

03:21:48PM 24 The position was that the Corps does not have to
03:21:52PM 25 evaluate impacts, downstream burning of fossil fuels. And

1 courts have repeatedly ruled otherwise. The *Columbia*
2 *Riverkeeper v United States Army Corps of Engineers*, that case
3 involved the Army Corps's permitting of a methanol export
4 facility in Washington. It was a, quote/unquote, "midstream
5 facility," much like pipelines. And the Court there said, "The
6 Corps's assertion that the greenhouse gas emissions are outside
7 their jurisdiction does not relieve its duty to take a hard
8 look."

9 The Court there looked at the public interest factors
10 that the Army Corps has to apply and said they clearly apply
11 there to greenhouse gas emissions and required the Corps to
12 evaluate the emissions from upstream fracking and downstream
13 burning of -- or, excuse me -- production of these chemicals in
14 Asia.

15 So here we had a 404 permit for an export facility.
16 The permit was limited to the discharges of dredge and fill
17 material for the construction of this facility. And here we
18 have a Court saying, "The Army Corps was required under NEPA to
19 look at the downstream burning of fossil fuels."

20 So clearly the Corps would be able to do that here,
21 and it would inform their decision as to whether or not the
22 impacts of this massive permit are minimal.

23 Now, in the interest of time, I would like to turn to
24 the Clean Water Act claim real quick, unless the Court has any
25 questions about NEPA.

03:23:35PM 1 THE COURT: No, go ahead.

03:23:37PM 2 MR. HAYES: So the Clean Water Act claim boils down
03:23:42PM 3 to this: The Corps has issued Nationwide Permit 12, which
03:23:46PM 4 allows pipelines to use the permit an unlimited amount of times
03:23:52PM 5 to permit these massive pipelines, sometimes hundreds,
03:23:58PM 6 sometimes thousands of individual water crossings that it
03:24:01PM 7 considers, quote/unquote, "single and complete projects."

03:24:05PM 8 Now, they have two main justifications for ensuring
03:24:09PM 9 minimal effects, despite this unlimited nature, neither of
03:24:13PM 10 which withstand scrutiny. The first is that the Corps argues,
03:24:20PM 11 at the project-level review, district engineers will be able to
03:24:25PM 12 ensure -- look at projects and ensure the environment impacts
03:24:31PM 13 will be only minimal.

03:24:33PM 14 The problem there is very simple. The EA itself
03:24:36PM 15 estimates that for over 7,000 projects over a five-year period,
03:24:42PM 16 there will be no project-level review. So for 7,250 pipeline
03:24:50PM 17 water crossings, the Corps will never know about it. There
03:24:53PM 18 will never be an opportunity to evaluate the project-level
03:24:56PM 19 impacts.

03:24:58PM 20 The Corps -- excuse me -- the defendants point to
03:25:02PM 21 some of the previous cases about Nationwide Permit 12, but none
03:25:06PM 22 of those cases involve the facts that we have here, which is
03:25:11PM 23 the Corps expressly admitting that some-thousand -- 7,000
03:25:18PM 24 projects will escape that review altogether. None of the
03:25:21PM 25 previous versions of Nationwide Permit 12 contain that

03:25:25PM 1 admission. None of the courts discussed it.

03:25:27PM 2 The second justification that the Corps uses to
03:25:33PM 3 ensure minimal effects at the project level is this idea that
03:25:39PM 4 crossings are located at separate and distant locations along
03:25:42PM 5 the pipeline, and they get this language from the Corps's
03:25:49PM 6 implementing regulations at 33 CFR 330.2.

03:25:53PM 7 But it's important to look at that regulation because
03:25:57PM 8 what it does is allow the Corps to treat separate crossings as
03:26:04PM 9 separate projects only if they're located at separate and
03:26:08PM 10 distant locations. What the Corps has done here is to take
03:26:12PM 11 that regulation and say -- and simply assume that all of the
03:26:17PM 12 water crossings along any linear pipeline are, in fact,
03:26:20PM 13 separate and distant.

03:26:22PM 14 Again, this is based on the record of this permit
03:26:26PM 15 reissuance. The plaintiffs have provided multiple examples of
03:26:32PM 16 this never occurring -- of pipelines where there are thousands
03:26:36PM 17 of water crossings, sometimes a dozen within a mile. There was
03:26:40PM 18 never any separate and distant determination. It's a step that
03:26:47PM 19 the Corps claims happens but, in practice, it surely doesn't.

03:26:52PM 20 The Corps's reason for not defining separate and
03:26:57PM 21 distant is that it may vary by region. The Corps says they
03:27:01PM 22 can't do a one-size-fits-all definition of separate and
03:27:06PM 23 distant, which is fine, but the Corps fails to take the next
03:27:11PM 24 step, which is they have to -- if they're going to take that
03:27:13PM 25 position, they have to actually require district engineers or

03:27:17PM 1 regions to establish some kind of local guidelines or at least
03:27:23PM 2 make sure that at the project level these crossings are in fact
03:27:28PM 3 separate and distant, and they've failed to do that here.

03:27:34PM 4 Again, plaintiffs have provided multiple examples in
03:27:35PM 5 our comments on the reissuance. The Corps failed to respond to
03:27:39PM 6 them at all, which is arbitrary and capricious in and of
03:27:43PM 7 itself. But what they've done here is in the face of
03:27:46PM 8 continuing evidence, every time they reissue this permit, they
03:27:50PM 9 ignore the evidence and continue to bury their head in the
03:27:56PM 10 sand, as the Court said in *Kraayenbrink*, and that's a violation
03:28:00PM 11 of the APA and the Clean Water Act.

03:28:07PM 12 Unless the Court has any questions, I'll leave it at
03:28:10PM 13 that.

03:28:10PM 14 THE COURT: All right. Thank you, Mr. Hayes.

03:28:12PM 15 Is that it for the plaintiffs? Why don't we take a
03:28:18PM 16 five-minute recess and come back.

03:28:20PM 17 (Proceedings in recess from 3:28 p.m. until 3:38 p.m.)

03:38:42PM 18 THE COURT: Everyone back on Zoom? We had six
03:38:45PM 19 before. All right. There we go.

03:38:53PM 20 Mr. Howell.

03:38:55PM 21 MR. HOWELL: Thank you, Your Honor. Good afternoon.
03:39:08PM 22 I'll be handling the Endangered Species Act issues as well as
03:39:14PM 23 standing.

03:39:14PM 24 THE COURT: All right. Let's start with standing, if
03:39:15PM 25 you would.

03:39:16PM 1 MR. HOWELL: Okay. So I think the best place to
03:39:23PM 2 start with standing is where we left off in this Court's
03:39:27PM 3 decision in *Northern Plains*. So we have the Supreme Court
03:39:31PM 4 staying injunctive relief. And I think it's difficult to
03:39:40PM 5 interpret what that stay means. But what they did is they
03:39:45PM 6 stayed injunctive relief except for the project that the
03:39:49PM 7 plaintiffs identified, which was Keystone XL.

03:39:54PM 8 And so I think a fair interpretation of that stay
03:39:58PM 9 order is that the plaintiffs need to identify a specific
03:40:01PM 10 project in order to receive a remedy.

03:40:07PM 11 THE COURT: Well, on the other hand, though, that
03:40:09PM 12 order related to emergency relief. You could argue if you're
03:40:14PM 13 going to obtain emergency relief, you have to identify a
03:40:17PM 14 specific project.

03:40:20PM 15 How do you respond to that?

03:40:22PM 16 MR. HOWELL: I mean, I think that's also a fair
03:40:24PM 17 interpretation of that order, but the remedy is also tied up
03:40:29PM 18 with standing. And I think the way we look at it, you know,
03:40:32PM 19 the issues that were briefed depended on what injury and fact
03:40:38PM 20 was actually occurring. And it was Keystone XL. That was the
03:40:44PM 21 project that they identified. The PCN had been issued prior to
03:40:49PM 22 the complaint, and the verifications were done. And then we
03:40:54PM 23 move into the case.

03:40:56PM 24 Here, in contrast, we have very different
03:41:01PM 25 declarations and different -- very different assertions of

03:41:05PM 1 harm.

03:41:06PM 2 So if we look at the plaintiffs' standing
03:41:07PM 3 declarations, there's two groups -- or two categories, I'll
03:41:12PM 4 call them. The first is where they identify a specific
03:41:19PM 5 project. The second are these more generalized assertions of
03:41:26PM 6 harm that don't identify the projects, and let me take those in
03:41:28PM 7 turn.

03:41:29PM 8 So the declarations that identify a project -- you
03:41:34PM 9 have Mr. Krum, you have Mr. Hamel, Mr. Hartl. They identified
03:41:41PM 10 Byron pipeline, the Bullitt pipeline in Kentucky, and the
03:41:47PM 11 Pamplico pipeline in South Carolina.

03:41:49PM 12 The Byron pipeline, there are no ESA-listed species,
03:41:57PM 13 critical habitat. Plaintiffs have conceded they're not relying
03:41:59PM 14 on that declaration for their ESA claims. So that's out.

03:42:03PM 15 The other two, Bullitt and Pamplico, we don't have a
03:42:11PM 16 lot of controversy there. Bullitt, the verification has been
03:42:14PM 17 suspended. We don't have authorization to move forward.

03:42:26PM 18 Pamplico, that's pending in South Carolina. So that
03:42:28PM 19 energy company -- I believe it's Dominion Energy -- does not
03:42:31PM 20 have authorization to move forward and perform any activities
03:42:36PM 21 associated with those wetlands. So we don't have a live
03:42:41PM 22 controversy for the projects that the plaintiffs have
03:42:44PM 23 identified.

03:42:46PM 24 Venue: Before I turn to the second category of
03:42:53PM 25 declarations, we also have a venue problem here, at least with

03:42:58PM 1 respect to the ESA claims. So Byron pipeline, no ESA-listed
03:43:08PM 2 species.

03:43:08PM 3 And I want to address Mr. Margolis' argument about
03:43:15PM 4 waiver and estoppel. So in their complaint -- and this is at
03:43:19PM 5 paragraph 17 and 28 -- they make the allegation that there will
03:43:25PM 6 be oil and gas pipelines that are constructed in this district
03:43:31PM 7 and because plaintiff MEIC resides in the district.

03:43:35PM 8 Now, we move forward through summary judgment. And
03:43:40PM 9 if you look at the allegations at paragraph 28, they talk about
03:43:43PM 10 oil and gas development in the Bakken oil fields. As we move
03:43:50PM 11 forward -- and the evidence that they presented to the Court on
03:43:53PM 12 summary judgment, there is no oil and gas development in their
03:43:58PM 13 standing declarations about the Bakken oil fields. So the
03:44:02PM 14 allegation doesn't end up being true in their complaint.

03:44:06PM 15 Byron pipeline, the project that they identify in
03:44:12PM 16 this district, they concede on their ESA claims in their
03:44:18PM 17 opposition brief. So all of that happens after. So we didn't
03:44:22PM 18 waive our argument. We're not estopped from arguing it. It's
03:44:27PM 19 that they didn't present the evidence that they made the
03:44:30PM 20 allegation in their complaint about. So it's an evidentiary
03:44:34PM 21 problem for this -- for the plaintiffs right now. So there's
03:44:39PM 22 definitely a venue problem with ESA claims.

03:44:42PM 23 Let me turn back to the second category of --

03:44:48PM 24 THE COURT: Where do plaintiffs get the idea that you
03:44:51PM 25 conceded venue in your response?

03:44:56PM 1 MR. HOWELL: Well, we certainly didn't do it in our
03:45:00PM 2 briefing. We didn't raise it in our opening brief.

03:45:03PM 3 THE COURT: The answer to the complaint.

03:45:06PM 4 MR. HOWELL: Well, we were taking their allegations
03:45:11PM 5 as true. They made a sufficient allegation in their complaint
03:45:16PM 6 that would have established venue, but then they didn't prove
03:45:19PM 7 it up.

03:45:21PM 8 And so, I guess, you know, to boil it down, I mean,
03:45:23PM 9 we have an evidentiary objection to venue right now because the
03:45:27PM 10 evidence doesn't support venue, and it's fair for us to raise
03:45:32PM 11 that now.

03:45:35PM 12 The second category of declarations, they don't
03:45:45PM 13 identify any projects. There is a hypothesis that these
03:45:50PM 14 declarants are going to be -- that the general permit is going
03:45:56PM 15 to be used in a location near them, and it's going to affect
03:45:59PM 16 the listed species, thereby harming their interest. But they
03:46:03PM 17 never identify any specific project.

03:46:06PM 18 That's the same fact pattern that we have in *Summers*.
03:46:11PM 19 They're relying on a statistical probability that that
03:46:16PM 20 declarant is going to be in a location --

03:46:19PM 21 THE COURT: How could they identify a project at this
03:46:21PM 22 stage?

03:46:23PM 23 MR. HOWELL: How could they identify a project?
03:46:26PM 24 Well, they've been able to do it with Byron pipeline, Bullitt
03:46:31PM 25 pipeline, Pamplico pipeline. I mean, these are sophisticated

03:46:37PM 1 environmental organizations with probably hundreds of thousands
03:46:38PM 2 of members all over the state. These oil and gas pipelines
03:46:44PM 3 aren't a secret. So if -- you know, there are FERC
03:46:51PM 4 proceedings. There's state proceedings. They're not being
03:46:53PM 5 done under the cover of darkness.

03:46:56PM 6 And if you have truly a standing declarant that
03:47:00PM 7 has -- well, take Mr. Krum, for example. He has a daughter.
03:47:05PM 8 His daughter lives where they're going to do horizontal
03:47:10PM 9 drilling under the Yellowstone River. He's aware of that. But
03:47:14PM 10 there's no ESA-listed species or critical habitat there so that
03:47:18PM 11 can't support standing. So it's not like these are secrets.

03:47:22PM 12 THE COURT: Are the PCNs public?

03:47:25PM 13 MR. HOWELL: No, they are not.

03:47:32PM 14 THE COURT: All right. Well, then you have to do
03:47:34PM 15 some digging to find out about projects.

03:47:38PM 16 MR. HOWELL: I think that's fair, Your Honor, yeah.

03:47:40PM 17 Well, but if you're a declarant that has an interest
03:47:46PM 18 in species, you know where those species are located. You know
03:47:50PM 19 about critical habitat. And if there's a proposed oil and gas
03:47:54PM 20 pipeline in that location, that would probably raise your
03:48:00PM 21 antenna, and you would know about it.

03:48:04PM 22 The point here is their standing declarations, the
03:48:09PM 23 projects that they identify are insufficient. They're not a
03:48:13PM 24 live controversy right now. The other set presents a *Summers*
03:48:17PM 25 problem, where they're relying on that statistical probability.

1 But it goes a step further that moves us past
2 *Summers*, and I think this addressed the plaintiffs' reliance on
3 the Ninth Circuit's decision in *National Family* and the recent
4 decision that they cite for standing purposes, *Environmental*
5 *Defense Center* and *BOEM* on their supplemental authority.

6 So in both of those cases -- take *National Family*,
7 EPA authorized the use of pesticides. They knew pesticides
8 were going to be applied in the location where their declarant
9 was. It was going to affect milkweed. That milkweed was a
10 source of food for the Monarch butterfly. And, therefore, the
11 connection between the Monarch butterfly and the declarant's
12 interest in viewing it and the authorized use of the pesticide,
13 that was sufficient for standing purposes. That makes sense.

14 In the *BOEM* case, you have authorized drilling going
15 on, and that drilling, everybody acknowledged, was -- certainly
16 rose to the level of "may affect" and, in some cases, adversely
17 affected the listed species. So you have an authorized
18 drilling going on.

19 And, you know, putting aside the cases about whether
20 an EA is a final agency action -- and we didn't raise standing
21 in that case. It was a ripeness argument. But in those
22 circumstances, when you have an authorization that has the
23 potential to affect listed species, that may support standing.

24 But here -- and I think it's worth stepping back.
25 Mr. Hayes talked about this general permit authorizing certain

activities to take place, 50,000 uses. Well, about 80 percent of those uses are going to trigger a PCN, according to the Corps.

So what we're really talking about here are 10,000 uses that -- he's right. There's a permit to dredge and fill in waters of the United States or do other activities. But here's the catch: General Condition 18 doesn't allow those 10,000 activities to move forward in the vicinity of listed species or critical habitat.

So if you are a pipeline company and you are designing a pipeline, you have an incentive to move your pipeline away from listed species in critical habitat. Because if you do, if you put it in a place where there are no listed species in the vicinity, you don't have to do a PCN. You don't have to consult with Fish & Wildlife or NMFS. You don't have to wait for the Corps for a verification. There's an incentive to move the activity away from listed species. And that's good for them, and that's good for listed species.

My point is, you're not going to have a discharge or fill under the general permit with a listed species or critical habitat because you have General Condition 18. It's unauthorized conduct at that point, if it in fact happens. And the record demonstrates that the Corps is unaware of any incident of that happening. So that's a finding that they made in the administrative record.

03:52:04PM 1 So my point is the hypothesis that they're relying
03:52:09PM 2 on, the *Summers* standing, their procedural injury, it cannot
03:52:12PM 3 come to pass because of the conditions in the permit.

03:52:18PM 4 So you asked at the outset, why is this case
03:52:21PM 5 different than *Northern Plains*? I think one of the big reasons
03:52:26PM 6 is we have insufficient standing declarations to support their
03:52:30PM 7 allegations with the ESA complaint. We have a problem with
03:52:34PM 8 venue too. We didn't have that in the other case.

03:52:39PM 9 So unless the Court has any other questions on
03:52:44PM 10 standing, I'd like to move to the merits of the ESA claim.

03:52:47PM 11 THE COURT: All right. So what consultation did you
03:52:50PM 12 conduct?

03:52:52PM 13 MR. HOWELL: So under the Endangered Species Act,
03:52:59PM 14 under the consultation regulations, if an action agency like
03:53:03PM 15 the Corps makes a "no effect" determination, that fulfills both
03:53:09PM 16 their procedural obligation to consult under Section 7(a)(2),
03:53:14PM 17 and their substantive obligations under 7(a)(2) as well. So
03:53:19PM 18 you have a procedural and substantive component. That "no
03:53:25PM 19 effect" determination fulfilled that requirement. So --

03:53:29PM 20 THE COURT: When did you make that determination?

03:53:31PM 21 MR. HOWELL: When?

03:53:32PM 22 THE COURT: Yes.

03:53:33PM 23 MR. HOWELL: It was made in conjunction with issuance
03:53:38PM 24 of the nationwide permit.

03:53:41PM 25 THE COURT: So after the *Northern Plains* decision?

03:53:43PM 1 MR. HOWELL: Correct. Yes.

03:53:49PM 2 So the Corps's "no effect" finding is our response to
03:53:53PM 3 the Court's remand order.

03:53:57PM 4 THE COURT: How could you make that determination
03:53:59PM 5 without consulting the relevant agencies?

03:54:03PM 6 MR. HOWELL: Well, so, I think -- Okay. One of --
03:54:08PM 7 there are two factors -- or two issues, I think, that sets us
03:54:16PM 8 apart from *Northern Plains*. The first is the issuance of the
03:54:21PM 9 Ninth Circuit's decision in *National Family*. So that decision
03:54:24PM 10 comes out three months after this Court issues its opinion in
03:54:28PM 11 *Northern Plains*.

03:54:30PM 12 And in that decision, the Ninth Circuit, I think,
03:54:33PM 13 somewhat clarify the obligations under the Endangered Species
03:54:40PM 14 Act. They build on their *California Lockyer* decision, and what
03:54:41PM 15 they said is if you have specific and binding commitments, an
03:54:47PM 16 action agency, like the Corps, can reach a reasonable "no
03:54:52PM 17 effect" determination, thereby fulfilling its procedural and
03:54:55PM 18 substantive duties under Section 7. That decision, I think,
03:55:03PM 19 changes the legal landscape from where we were in *Northern*
03:55:07PM 20 *Plains*.

03:55:07PM 21 THE COURT: What was the agency at issue in the Ninth
03:55:11PM 22 Circuit case?

03:55:14PM 23 MR. HOWELL: So in *National Family*, the action is EPA
03:55:17PM 24 registering pesticides, Enlist Duo, as well as issuing label
03:55:24PM 25 restrictions.

03:55:25PM 1 And I think this case is very similar to the case we
03:55:29PM 2 have here. So when EPA puts out a pesticide, they have a label
03:55:35PM 3 that says, Here's how you can use your pesticide. They say
03:55:40PM 4 there's a 30-foot buffer. There's nozzle restrictions.
03:55:45PM 5 There's restrictions on water and temperature and time of day
03:55:49PM 6 and all of these kinds of things. It's a label that you read
03:55:52PM 7 on the pesticide, and they rely on the farmers to follow that
03:55:56PM 8 label.

03:55:57PM 9 And if you follow -- and so what -- and this is
03:56:02PM 10 page 927 of that opinion. What EPA did is that they assumed
03:56:07PM 11 compliance. They assumed that these farmers are going to
03:56:10PM 12 comply with the label. And based on that assumption, they
03:56:16PM 13 analyze what effect is it going to have on listed species, what
03:56:20PM 14 effect, the pesticides.

03:56:23PM 15 And they even went so far to find that there was
03:56:25PM 16 going to be exposure. Listed species were going to be exposed
03:56:29PM 17 to this harmful pesticide, but it was within the normal range.
03:56:34PM 18 And the Ninth Circuit said that was sufficient -- or it was
03:56:39PM 19 reasonable to make a "no effect" determination which fulfills
03:56:43PM 20 your ESA consultation requirements.

03:56:47PM 21 THE COURT: So the Corps didn't appeal the *Northern*
03:56:51PM 22 *Plains* decision?

03:56:52PM 23 MR. HOWELL: The --

03:56:56PM 24 THE COURT: The Corps appealed the *Northern Plains*
03:56:59PM 25 decision with regard to the vacatur --

03:57:01PM 1 MR. HOWELL: Correct.

03:57:02PM 2 THE COURT: -- but not regarding the merits?

03:57:06PM 3 MR. HOWELL: Your Honor, I don't know that off the
03:57:10PM 4 top of my head.

03:57:10PM 5 THE COURT: Well, I haven't seen any Ninth Circuit
03:57:14PM 6 decision regarding the merits decisions. Have you?

03:57:19PM 7 MR. HOWELL: No.

03:57:19PM 8 And we are moving to vacate the District Court
03:57:24PM 9 opinion, which I believe this Court has set that for argument
03:57:28PM 10 later this month.

03:57:30PM 11 THE COURT: So at what point did the Corps say, "Oh,
03:57:34PM 12 gosh, we can rely on the National Family's decision and make
03:57:39PM 13 our own determination on the need to consult"?

03:57:42PM 14 MR. HOWELL: Yep.

03:57:43PM 15 THE COURT: When was that decision made?

03:57:44PM 16 MR. HOWELL: So prior to completing our issuance of
03:57:50PM 17 the general permit, the Corps sat down and conducted and --
03:57:55PM 18 well, they compiled a biological assessment, a BA. And this BA
03:58:03PM 19 looked at a lot of different things. It looked at the data on
03:58:07PM 20 prior use. They looked at where species were located.

03:58:14PM 21 And I would point the Court -- there's a great table
03:58:18PM 22 in this biological assessment, and this is NWP003611, all the
03:58:26PM 23 way to 27. It's Table 5.1. And they list out all the species
03:58:33PM 24 and all the consultations that have taken place on those
03:58:36PM 25 species, I believe, with respect to the PCNs -- permit

activities.

So they sit down, and they find hot spots of listed species, and they look at how many times they estimate the general permit is going to be used, and they analyze all of that. And that analysis really tracks the -- what EPA did in *National Family*. It's the same analysis. They sit down, and they're trying to figure out whether there is going to be a "may affect" that triggers the consultation in the biological assessment. In that biological assessment, they reach the conclusion that there will be no effect on listed species.

So that's where -- so you're asking, where did we do the consultation? That biological assessment and that "no effect" finding, that's the culmination of the Corps' response to this Court's order, remand order, in *Northern Plains*.

THE COURT: That's in the record in this case?

MR. HOWELL: Correct.

The other aspect of this -- so in *National Family* -- so we have a different factual record here. We have a biological assessment. We have a "no effect" determination.

If you look at the *National Family* decision -- and this is on page 928 -- there's a discussion about whose burden it is to undermine the "no effect" finding. And the Ninth Circuit made clear that it's the plaintiffs' burden to present record evidence that's going to undermine the "no effect" finding that the Corps made.

04:00:38PM 1 We don't have that here. We don't have the
04:00:43PM 2 plaintiffs coming forward saying, "Here in the record, this is
04:00:47PM 3 what undermines the 'no effect' finding."

04:00:51PM 4 And we actually have the opposite. We have the Corps
04:00:54PM 5 making an explicit finding that they are not aware of any
04:01:00PM 6 activity occurring that's going to affect listed species or
04:01:05PM 7 critical habitat that doesn't go through that PCN and a
04:01:10PM 8 separate verification system. That's a separate agency action.
04:01:16PM 9 And that record cite is NWP003583. That's in the biological
04:01:35PM 10 assessment. The Corps is making that finding.

04:01:37PM 11 So, I guess, Your Honor, to summarize, the Corps was
04:01:43PM 12 mindful of this Court's order in *Northern Plains*. It took it
04:01:47PM 13 seriously. The *National Family* decision comes out three months
04:01:53PM 14 later. It's controlling in the circuit. The Corps sat down,
04:01:59PM 15 compiled a lengthy, lengthy biological assessment. It looked
04:02:04PM 16 at the data. It looked at the species. It makes its
04:02:07PM 17 cumulative effect findings. And it ultimately reaches the same
04:02:10PM 18 conclusion: No effect. It's much more supported than the
04:02:14PM 19 previous one, and you have a biological assessment. That's
04:02:20PM 20 what concluded the Corps's ESA responsibilities.

04:02:24PM 21 THE COURT: Just to clarify, you weren't counsel of
04:02:30PM 22 record in the *Northern Plains* case?

04:02:32PM 23 MR. HOWELL: That's correct.

04:02:33PM 24 THE COURT: Mr. Swanson and Mr. Grillot were counsel
04:02:37PM 25 of record?

04:02:38PM 1 MR. HOWELL: Correct.

04:02:39PM 2 THE COURT: So they would be able to answer the
04:02:41PM 3 question about whether the Corps filed an appeal?

04:02:47PM 4 MR. SWANSON: Yes, Your Honor.

04:02:47PM 5 MR. HOWELL: Yes.

04:02:47PM 6 MR. SWANSON: This is Chris Swanson. The Corps did
04:02:50PM 7 appeal the merits of the ESA finding, as well as the remedy.
04:02:54PM 8 The Ninth Circuit dismissed that appeal as moot with direction
04:02:59PM 9 for the Court to dismiss the underlying ESA claim in it.

04:03:04PM 10 THE COURT: When was that?

04:03:06PM 11 MR. SWANSON: That was in the fall, I believe. And
04:03:12PM 12 on the Court's docket now is briefing with respect to whether,
04:03:17PM 13 as a result of that Ninth Circuit order, the Court's opinion
04:03:20PM 14 should be vacated. I believe the hearing on that motion is
04:03:24PM 15 later this month.

04:03:25PM 16 THE COURT: All right. Thank you.

04:03:26PM 17 Go ahead, Mr. Howell.

04:03:28PM 18 MR. HOWELL: Just one final point on this: The
04:03:35PM 19 argument that the Corps is relying on site-specific
04:03:39PM 20 consultations to fulfill their ESA obligation, that's not our
04:03:44PM 21 position. What our position is is that the "no effect"
04:03:47PM 22 determination is ESA compliance for issuance of the general
04:03:53PM 23 permit.

04:03:55PM 24 Now, I think everybody in this room, or at least the
04:04:02PM 25 lawyers on this side, agree that in order to trigger the

04:04:06PM 1 obligation to consult, there has to be a "may affect" finding.
04:04:13PM 2 And, here, we just don't have that because of General
04:04:19PM 3 Condition 18.

04:04:21PM 4 And my colleague, Mr. Margolis --

04:04:25PM 5 THE COURT: The Corps has the obligation to make the
04:04:27PM 6 "no effect" finding?

04:04:28PM 7 MR. HOWELL: The Corps does. That's correct.

04:04:32PM 8 And Mr. Margolis was making the point that without
04:04:36PM 9 doing a programmatic consultation, these escape review. But I
04:04:44PM 10 think one of the comments that the Court made earlier on -- so
04:04:49PM 11 you have the subset of activities that have this minimal impact
04:04:53PM 12 on the ecosystem. They're not located anywhere near listed
04:04:59PM 13 species. They cannot take place legally in the vicinity of
04:05:04PM 14 listed species. And so you have this roughly 10,000
04:05:10PM 15 anticipated crossings of waters of the United States that can't
04:05:14PM 16 take place near ESA-listed species or critical habitat.

04:05:20PM 17 So what would we do a programmatic consultation on?
04:05:25PM 18 There's no effect there. And if there's no effect, I mean,
04:05:31PM 19 it's just a paper exercise. I don't know what NMFS or Fish &
04:05:41PM 20 Wildlife Service would analyze in that context because there's
04:05:41PM 21 no effect because of that condition in the permit.

04:05:45PM 22 So this notion that there's going to be death by a
04:05:49PM 23 thousand cuts, there's no cut in the first place to those
04:05:54PM 24 listed species. So you don't have this aggregated impacts or
04:06:01PM 25 cumulative effects. You just don't have that in the first

04:06:03PM 1 place.

04:06:03PM 2 So I just want to be clear: The Corps is not relying
04:06:06PM 3 on future site-specific consultations to comply with the ESA.
04:06:14PM 4 Their "no effect" determination is their compliance. It's
04:06:18PM 5 supported by the biological assessment, and it's reasonable.
04:06:23PM 6 And it tracks the Ninth Circuit's decision in *National Family*
04:06:27PM 7 to a tee.

04:06:32PM 8 Your Honor, if you don't have any other questions,
04:06:34PM 9 I'll turn it over to my colleagues.

04:06:36PM 10 THE COURT: All right. Thank you, Mr. Howell.

04:06:39PM 11 Who is going to argue next for the government?

04:06:44PM 12 MR. GRILLOT: Yes, Your Honor. This is attorney
04:06:45PM 13 Ben Grillot. I'm going to, in the interest of time, speak
04:06:47PM 14 briefly on the Clean Water Act issue.

04:06:50PM 15 At the outset, I want to note and correct a few
04:06:53PM 16 things that opposing counsel said. At the beginning of his
04:06:56PM 17 argument, Mr. Hayes stated that after the permit is issued
04:07:00PM 18 there's, quote, "often no further Corps involvement."

04:07:03PM 19 But as Mr. Howell just pointed out, approximately 80
04:07:06PM 20 to 85 percent of activities authorized under Nationwide
04:07:10PM 21 Permit 12 require a PCN. And for those that don't, as
04:07:13PM 22 Mr. Howell noted, those are situations in which there are no
04:07:17PM 23 species that would be affected. The amount of land at issue is
04:07:20PM 24 less than a tenth of an acre. And many of the impacts are
04:07:24PM 25 temporary in nature, and applicants are required to restore

04:07:28PM 1 those back to their original condition.

04:07:30PM 2 The second key point that I want to clarify is that
04:07:35PM 3 Counsel Hayes continued to refer to the 47,000 activities that
04:07:37PM 4 were authorized by Nationwide Permit 12 as crossings or
04:07:41PM 5 projects, but, in fact, they're just activities. And -- a
04:07:44PM 6 specific crossing could have multiple activities associated
04:07:47PM 7 with it, and it's an overstatement and a conflation of the
04:07:51PM 8 facts to call each activity authorized under Permit 12 a
04:07:56PM 9 crossing.

04:07:57PM 10 Instead, as noted, there was roughly 1,500 activities
04:08:00PM 11 a year that occur without a PCN, but the Corps reasonably
04:08:06PM 12 concluded that on the whole, Nationwide Permit 12's
04:08:10PM 13 environmental impacts would be minimal, which is what's
04:08:12PM 14 required under 404(e) of the Clean Water Act.

04:08:14PM 15 And to make two arguments: One, that
04:08:17PM 16 project-specific review is not sufficient; and, two, a point
04:08:22PM 17 about separate and distant crossings. I'll touch on each of
04:08:23PM 18 them very briefly.

04:08:25PM 19 The project-specific review, the tiering of review in
04:08:27PM 20 which, again, 80-some percent of activities require a PCN to
04:08:31PM 21 get a closer look. That structure has been upheld since 2005
04:08:35PM 22 in the *BuTen* case when the Fourth Circuit found that reliance
04:08:38PM 23 on post-issuance procedures is, quote, "a reasonable, if not
04:08:41PM 24 the only possible way, to determine a project has minimal
04:08:44PM 25 environmental impacts."

04:08:46PM 1 So what the Corps did is they looked carefully at
04:08:49PM 2 uses of the permit in the past, including from March 2017 to
04:08:54PM 3 March 2019, compiled them in a detailed spreadsheet that's in
04:08:57PM 4 the record -- it's NWP20219 -- looked at public comments, and
04:09:02PM 5 included conditions, the PCN conditions, that reflected the
04:09:06PM 6 foreseeable effects for those instances in which the
04:09:09PM 7 environmental impact might be more than minimal to give them
04:09:12PM 8 further scrutiny by district engineers.

04:09:15PM 9 This structure, reflecting foreseeable effects, was
04:09:18PM 10 upheld in the context of Nationwide Permit 12 by the
04:09:22PM 11 Tenth Circuit in *Bostick*, and it has been repeatedly upheld in
04:09:23PM 12 other contexts across the country. The plaintiffs make vague
04:09:30PM 13 assertions that those aren't enough.

04:09:31PM 14 So unless you have further questions about the
04:09:34PM 15 appropriateness of project-specific review for Clean Water Act,
04:09:36PM 16 I'll move on to separate and distant crossings.

04:09:39PM 17 THE COURT: Go ahead, please.

04:09:42PM 18 MR. GRILLOT: Okay. Since 1988, the Corps has
04:09:44PM 19 defined each crossing of a water body, meaning the same water
04:09:49PM 20 body or multiple water bodies, as a single and complete
04:09:50PM 21 project, provided the crossings are at separate and distant
04:09:53PM 22 locations.

04:09:54PM 23 I mean, the important point that the plaintiffs
04:09:57PM 24 conflate here is that they say that there's an assumption that
04:09:59PM 25 all crossings are separate and distant. They ignore the fact

04:10:03PM 1 that when a district engineer verified the PCN, then they have
04:10:06PM 2 determined that a crossing is sufficiently separate and
04:10:09PM 3 distant. If it wasn't, they would require modifications to the
04:10:11PM 4 permit under their authority in 33 CFR 330.5, 330.1. They'd
04:10:19PM 5 require modifications, or in some instances, require an
04:10:21PM 6 individual permit. So if a district engineer has verified a
04:10:25PM 7 PCN, then they have determined that those crossings are
04:10:27PM 8 sufficiently separate and distant.

04:10:28PM 9 And the plaintiffs are looking for specific spacing
04:10:31PM 10 requirements. But as noted and as been upheld by every court
04:10:35PM 11 that's looked at this issue, district engineers require
04:10:38PM 12 flexibility to take into account local conditions --
04:10:41PM 13 topography, geology, hydrology -- and make a determination
04:10:44PM 14 whether or not those crossings are separate and distant.

04:10:49PM 15 Plaintiffs point to crossings under Keystone and
04:10:52PM 16 the Gulf Coast. The specific crossings that they point to
04:10:55PM 17 under the Gulf Coast were upheld and challenged in *Bostick*.
04:10:59PM 18 The Keystone crossings, although verified, those verifications
04:11:02PM 19 were later suspended and then withdrawn. So it's never been
04:11:05PM 20 litigated.

04:11:08PM 21 They cannot point to an instance in which district
04:11:10PM 22 engineers have verified crossings that caused more than minimal
04:11:13PM 23 environmental effects, nor can they.

04:11:16PM 24 And for this reason, the Corps' longstanding approach
04:11:18PM 25 to linear projects, again, since 1988, deserves deference and

04:11:22PM 1 should be upheld, and the Corps's determination that Nationwide
04:11:29PM 2 Permit 12 satisfies 404(e) of the Clean Water Act should be
04:11:34PM 3 granted.

04:11:34PM 4 THE COURT: All right. Thank you, Mr. Grillo.
04:11:36PM 5 Mr. Swanson.

04:11:38PM 6 MR. SWANSON: Yes, thank you, Your Honor. I'll be
04:11:41PM 7 addressing the NEPA claims.

04:11:41PM 8 Mr. Hayes categorized plaintiffs' arguments into two
04:11:46PM 9 categories, one being these operational or downstream
04:11:50PM 10 combustion effects and another being construction-related
04:11:54PM 11 effects. And I'll address in those categories as well and, at
04:12:00PM 12 the outset, note that the major problem with plaintiffs'
04:12:03PM 13 arguments is that they continue to ignore the limited nature of
04:12:07PM 14 the Corps action here.

04:12:09PM 15 When one appropriately views that limited action
04:12:14PM 16 through the lens of a couple legal principles, which I'll go
04:12:16PM 17 through, it becomes evident that the Corps did in fact
04:12:19PM 18 reasonably assess effects from its action in the EA.

04:12:24PM 19 Starting with the category of the operational
04:12:27PM 20 impacts -- these are oil spills and downstream climate
04:12:31PM 21 impacts -- there's three key NEPA principles that would govern
04:12:35PM 22 the Court's review here.

04:12:37PM 23 The first is that NEPA applies to major federal
04:12:39PM 24 actions, not private actions, not state actions, not local
04:12:43PM 25 actions.

1 The second, which is from the Ninth Circuit's
2 *White Tanks* opinion, is that NEPA requires an assessment of
3 potential effects that are triggered by the federal action.

4 And the third principle is that agencies are entitled
5 to deference in the reasonable scoping of their NEPA analyses,
6 including the impacts to be considered. That's the Ninth
7 Circuit's *Seilkirk* opinion.

8 So the question here on this operational impacts
9 issue for the Court is whether the Corps looked at what it was
10 supposed to, whether it looked at these effects in relation to
11 the action that it was authorizing, and reached a rational
12 conclusion about whether it needs to analyze those effects.

13 And the answer here is, yes, and that is in the
14 record at pages 953 -- 953 and 1035. And the Corps's reasoning
15 is that its action here is limited. Right? The major federal
16 action is the nationwide permit, which is defined by its terms
17 and conditions.

18 What that nationwide permit -- what the major federal
19 action here is not doing is it is not generally regulating or
20 authorizing the siting or operation of these pipelines. And,
21 thus, the Corps action here is not comparable to actions, say,
22 taken by the Federal Energy Regulatory Commission or the State
23 of Montana under the authorities the state cites in its brief,
24 and even not comparable to other federal actions that are more
25 directly approving fossil fuel extraction, for example, or

1 transportation.

2 And plaintiffs' error is trying to analogize the
3 Corps' limited authority to those broader authorities,
4 including in the attempted analogy to the DC Circuit,
5 *Sierra Club v FERC* opinion.

6 But the Corps' conclusion here is consistent with the
7 binding precedent in the Ninth Circuit, which would be
8 *Public Citizen* and the Ninth Circuit's *White Tanks* opinion,
9 which stand for the principle that where the federal agency's
10 role is a limited one, with respect to the action at issue, the
11 agency can reasonably focus its impacts on the effects from
12 that federal action.

13 Turning just quickly to the second category, these
14 are the impacts from horizontal directional drilling, forested
15 wetlands, and cumulative impacts. And, here, the question is
16 really one about the depth of the analysis. The Corps analyzed
17 these things. It's just that plaintiffs do not believe they
18 were analyzed sufficiently enough.

19 Two legal principles again at issue, one of which
20 Mr. Grillot mentioned, and that is the idea that with
21 nationwide permits, the analyses are necessarily and
22 appropriately general and predictive. And that's a function of
23 the congressional authority under which the Corps is acting.
24 And that's set forth in the Fourth Circuit's *Bulen* opinion.

25 And the second principle is that environmental

04:15:48PM 1 assessments, unlike environmental impact statements, are
04:15:53PM 2 supposed to briefly discuss potential impacts. And that's in
04:15:56PM 3 the NEPA regulations, 40 CFR, Section 1501.5(c).

04:16:02PM 4 So with those principles in mind here, the Corps did
04:16:07PM 5 assess and reasonably assess each of these three categories of
04:16:10PM 6 action -- impacts, excuse me. With respect to the directional
04:16:14PM 7 drilling, the Corps disclosed the potential for an inadvertent
04:16:18PM 8 return, which is plaintiffs' concern that money -- excuse me --
04:16:23PM 9 drilling mud would return out of the drilling hole during
04:16:26PM 10 installation of the pipeline. That's addressed at pages 1033
04:16:30PM 11 and 35 of the EA, which states the general impacts to wetlands
04:16:36PM 12 and water quality, which is then discussed in more detail at
04:16:41PM 13 pages 1036 to 1040.

04:16:42PM 14 Forested wetlands, similarly, disclosed that there
04:16:46PM 15 would be a conversion of those wetlands and that there could be
04:16:49PM 16 impacts on wetlands function. That's at pages 1035 to -37 and
04:16:54PM 17 961 to -64.

04:16:56PM 18 And, similarly, with cumulative impacts, the Corps
04:17:00PM 19 conducted a national-level review, as courts have required it
04:17:02PM 20 to do for nationwide permits, and compared the current status
04:17:07PM 21 of the national aquatic environment, generally, and the impacts
04:17:12PM 22 that this permit would have on that environment.

04:17:15PM 23 And unless the Court has any other questions, I'll
04:17:17PM 24 stop there in the interest of time.

04:17:19PM 25 THE COURT: All right. Thank you, Mr. Swanson.

04:17:21PM 1 All right. Any other defendants going to speak
04:17:27PM 2 today?

04:17:29PM 3 MR. HOWELL: Your Honor, not from the government, but
04:17:35PM 4 I believe --

04:17:35PM 5 MS. CASNER: I believe that Ms. Brown has some
04:17:35PM 6 comments that she would like to make.

04:17:35PM 7 THE COURT: All right. Ms. Brown.

04:17:35PM 8 MS. BROWN: Yes, Your Honor. Thank you.

04:17:42PM 9 THE COURT: Would you identify whom you represent?

04:17:42PM 10 MS. BROWN: Yes. I represent the Nationwide
04:17:46PM 11 Permit 12 Coalition, we're a defendant in the case.

04:17:46PM 12 THE COURT: All right. Go ahead, please.

04:17:48PM 13 MS. BROWN: I just had a couple quick points I wanted
04:17:51PM 14 to make on the ESA. I will defer to the arguments that have
04:17:53PM 15 already been presented by the government's counsel on the
04:17:57PM 16 Clean Water Act and NEPA issues.

04:18:00PM 17 But the Corps met its ESA obligations when it
04:18:01PM 18 determined that its action, which here is Headquarters'
04:18:04PM 19 reissuance of Nationwide Permit 12, has no effect on listed
04:18:08PM 20 species or designated critical habitat. And it's important to
04:18:11PM 21 recognize that that Headquarters' action has clearly defined
04:18:15PM 22 boundaries. It's bounded in scope, and it's restricted due to
04:18:18PM 23 General Condition 18.

04:18:20PM 24 General Condition 18 prohibits any of the project's
04:18:24PM 25 specific uses that might affect listed species or are in the

04:18:28PM 1 vicinity of the designated critical habitat absent appropriate
04:18:32PM 2 consultation.

04:18:33PM 3 And then, specifically, the district engineer needs
04:18:36PM 4 to tell the project proponent its activity is authorized. So
04:18:40PM 5 they may not continue until they receive that verification that
04:18:43PM 6 the consultation and the ESA requirements have been met.

04:18:46PM 7 And those project-specific uses of Nationwide
04:18:50PM 8 Permit 12 are new agency actions. Those project-specific uses
04:18:55PM 9 are distinct from the Headquarters' action, and the Corps
04:18:58PM 10 complies with the ESA independently for each discrete agency
04:19:03PM 11 action.

04:19:03PM 12 THE COURT: Ms. Brown.

04:19:03PM 13 MS. BROWN: Yes.

04:19:04PM 14 THE COURT: The Headquarters' action you're
04:19:07PM 15 discussing, do the Headquarters make any other determinations
04:19:10PM 16 in issuing the permit?

04:19:12PM 17 MS. BROWN: Headquarters reissued Nationwide
04:19:15PM 18 Permit 12 and determined that it has no effect on listed
04:19:17PM 19 species.

04:19:17PM 20 THE COURT: Right. But other than "no effects"
04:19:19PM 21 determination, did the Headquarters make any other decisions
04:19:23PM 22 about the adequacy of the analysis?

04:19:26PM 23 MS. BROWN: That's found in the biological
04:19:27PM 24 assessment, which Mr. Howell discussed where they analyzed --

04:19:32PM 25 THE COURT: No, I understand that. So they made a

04:19:34PM 1 "no effects" determination.

04:19:35PM 2 My question was whether Headquarters made any other
04:19:38PM 3 determinations about the effect, either on endangered species
04:19:44PM 4 or anything else related to the permit. Is this unique for the
04:19:49PM 5 Headquarters to make this kind of a determination, or do they
04:19:52PM 6 do it with regard to other issues as well?

04:19:54PM 7 MS. BROWN: Headquarters has made the same "no
04:19:58PM 8 effect" determination, I believe, for all of the nationwide
04:20:00PM 9 permits because of General Condition 18, which has the same
04:20:04PM 10 restriction for all nationwide permits.

04:20:05PM 11 THE COURT: All that have been issued throughout the
04:20:07PM 12 beginning of the act?

04:20:10PM 13 MS. BROWN: I don't -- I -- well --

04:20:15PM 14 THE COURT: We had a consultation in 2007 and 2012.

04:20:20PM 15 MS. BROWN: They had a voluntary consultation process
04:20:23PM 16 with NMFS.

04:20:27PM 17 THE COURT: Right. So did the Headquarters make a
04:20:28PM 18 "no effect" determination in addition to the voluntary
04:20:32PM 19 consultation?

04:20:33PM 20 MS. BROWN: I believe they did, but I would defer to
04:20:40PM 21 counsel for the government if there's something else on that
04:20:43PM 22 point.

04:20:43PM 23 THE COURT: All right. Go ahead, please.

04:20:46PM 24 MS. BROWN: Okay. So plaintiffs' claim boils down to
04:20:49PM 25 whether Headquarters' reissuance of Nationwide Permit 12 may

1 affect listed species or habitat, and it does not. The facts
2 here are distinguishable from the case cited by plaintiffs,
3 *Western Watersheds v Kraayenbrink*, which is a Ninth Circuit
4 decision from 2011.

5 Unlike Headquarters' reissuance of Nationwide
6 Permit 12, in *Western Watersheds*, there was resounding evidence
7 from the agency experts -- and those were the BLM scientists
8 and Fish & Wildlife Service -- that the amendments to grazing
9 regulations may affect listed species and habitat.

10 But there's nothing here that suggests that NWP 12
11 may affect listed species and habitat. The statements that
12 Mr. Margolis cites are from the Corps' public interest, NEPA,
13 and 404(b)(1) guidelines analyses, and they regard effects to
14 the environment or aquatic resources.

15 And then plaintiffs conflate those effects with
16 effects on listed species or designated critical habitat, but
17 they are not the same. None of the requisite statements that
18 are cited by plaintiffs discuss General Condition 18 or effects
19 to ESA-listed species or habit.

20 So the Corps developed its biological assessment,
21 which Mr. Howell discussed, that looked at these activities
22 that were authorized by the Headquarters' reissuance, and the
23 Corps properly determined that, as restricted and conditioned,
24 reissuance of Nationwide Permit 12 has no effect on listed
25 species or habitat.

1 Finally, as Your Honor mentioned, in this instance,
2 in the 2021 reissuance, the services, even though they have
3 authority to request consultation, they did not here, and they
4 indicated no disagreement with the Corps' "no effect" finding.

5 So once a "no effect" determination is made by the
6 action agency, that is the fulfillment of its obligations under
7 the ESA. Programmatic consultation is not required in this
8 instance. And the services regulations, which are not binding
9 on the Corps in any event, do not indicate to the contrary, but
10 they clarify that when there is a "no effect" finding, that's
11 the end of it. You don't have to engage in consultation on a
12 program or a rule or an action. No effect is the end of it.

13 I just wanted to address two cases that I think are
14 analogous to this situation, which the Court may like to look
15 at. There's *Center for Biological Diversity v Department of*
16 *Interior*, and that's at 563 F.3d 466, from the DC Circuit, in
17 2009. And that was a challenge to DOI's decision to expand
18 leasing on the Outer Continental Shelf for offshore oil and gas
19 development.

20 The plaintiffs in that case, CBD, argued that DOI
21 failed to consult. But the DC Circuit dismissed plaintiff's
22 ESA challenge due to the multistage nature of the leasing
23 program, explaining that the first stage of the leasing program
24 does not cause any harm because it does not require any action
25 or infringe on the welfare of animals, which is, by design,

04:23:41PM 1 only implicated at later stages in the program, each of which
04:23:44PM 2 requires ESA consultation. And that's at page 43.

04:23:47PM 3 The same is true here. The Headquarters' action is
04:23:50PM 4 limited to only those Nationwide Permit 12 activities that have
04:23:53PM 5 no effect on species or habitat. And, later, project-specific
04:23:58PM 6 activities that might effect species or habitat are only
04:24:03PM 7 authorized if and when the project-specific consultation is
04:24:07PM 8 undertaken and the Corps notifies the project proponent that
04:24:11PM 9 it's complete.

04:24:13PM 10 The second case is *NRDC v Department of the Navy*, and
04:24:17PM 11 this is found at 2002 Westlaw 32095131, and it's from the
04:24:23PM 12 Central District of California.

04:24:25PM 13 And, there, the Court confirmed that the Navy did not
04:24:29PM 14 improperly divide its action to avoid consultation. The action
04:24:34PM 15 at issue is the Navy's Littoral Warfare Advanced Development
04:24:37PM 16 Program, which serves as a framework to oversee and coordinate
04:24:40PM 17 future actions -- in this case, they were sea tests -- that
04:24:44PM 18 would be subject to appropriate ESA analysis on a --
04:24:44PM 19 (video disruption.)

04:24:44PM 20 (Clarification requested by stenographer.)

04:24:47PM 21 MS. BROWN: -- sea-test-by-sea-test basis.

04:25:16PM 22 The plaintiffs in that case had argued that the
04:25:18PM 23 program frameworks and future sea tests were a single program
04:25:22PM 24 and that the Navy was thus required to consult on that program
04:25:27PM 25 framework and the future tests as a whole, rather than only on

1 the individual sea tests. But the Court disagreed noting that
2 an agency has substantial discretion to determine whether a
3 program or its component elements are the more appropriate
4 object of ESA consultation.

5 The Navy had structured its program, like the Corps
6 has done with the nationwide permits, to provide for
7 consultation with NMFS on the individual sea tests when there
8 would be more concrete information available about the location
9 of the sea tests and the technology tested.

10 The Court found this to be proper, and it stated that
11 programmatic consultation was not necessary or worthwhile in
12 light of the Navy's pursuit of consultation in connection with
13 individual sea tests. That's precisely what we have here.

14 And, finally, if I might just take one minute, I
15 wanted to address the necessity of Nationwide Permit 12 for the
16 reliable, safe, and affordable delivery of energy. The
17 Coalitions' members are the companies primarily responsible for
18 pipeline construction, maintenance, repair, and servicing
19 activities that are authorized by Nationwide Permit 12, and
20 they have public service obligations to provide service to
21 customers which could not be met without this streamline
22 authorization.

23 As Your Honor pointed out, if we do not have
24 Nationwide Permit 12 and we're required to go through the
25 individual permit process for each of these activities that

04:26:50PM 1 have only minor impacts, it would really disrupt the entire
04:26:55PM 2 program, as well as be contrary to congressional intent in
04:26:59PM 3 establishing the nationwide permits.

04:27:01PM 4 The vast majority of projects that are authorized by
04:27:03PM 5 Nationwide Permit 12 are minor discharges of dredge or fill
04:27:07PM 6 material associated with small maintenance, repair, and removal
04:27:13PM 7 projects. They include projects that promote safety, energy,
04:27:16PM 8 resilience and reliability, and those that would help reduce
04:27:18PM 9 greenhouse gas emissions and support the transition to
04:27:18PM 10 renewables.

04:27:21PM 11 So they're critical to the goals of supporting
04:27:25PM 12 pipeline integrity assessment and management activities and
04:27:31PM 13 also pipeline right-of-way upkeep. These are crucial and
04:27:32PM 14 time-sensitive activities, and the work is often conducted on
04:27:37PM 15 tight schedules mandated by other federal agencies. We would
04:27:39PM 16 not be able to meet those deadlines without Nationwide Permit
04:27:42PM 17 12. There would be significant expense and delay, which would
04:27:46PM 18 harm the public, the environment, and our nation's economy,
04:27:50PM 19 energy security, and diversity. Thank you.

04:27:51PM 20 THE COURT: Thank you, Ms. Brown.

04:27:54PM 21 Mr. Margolis and Mr. Hayes, I'll give you a brief
04:27:58PM 22 rebuttal.

04:28:04PM 23 MR. MARGOLIS: Sorry, Your Honor?

04:28:07PM 24 MS. SMITHGALL: Your Honor --

04:28:07PM 25 THE COURT: I said I would give you a brief rebuttal.

04:28:07PM 1 MR. MARGOLIS: Yes, Your Honor. Thank you.

04:28:07PM 2 THE COURT: I'm sorry. Did someone --

04:28:10PM 3 MS. SMITHGALL: Your Honor, this is

04:28:12PM 4 Kathleen Smithgall --

04:28:12PM 5 THE COURT: I'm sorry.

04:28:13PM 6 MS. SMITHGALL: -- for the State of Montana, and I

04:28:13PM 7 was hoping I could just take a moment of your time.

04:28:17PM 8 THE COURT: I'm sorry, Ms. Smithgall.

04:28:19PM 9 Go ahead, please. I'll give you a minute.

04:28:20PM 10 MS. SMITHGALL: Your Honor, I appreciate it.

04:28:22PM 11 Good afternoon. And, again, my name is Katherine

04:28:23PM 12 Smithgall. I represent the State of Montana. I'll be very

04:28:26PM 13 brief. I just want to note the role of states in this process.

04:28:30PM 14 As the federal defendants have noted, the Corps has a

04:28:32PM 15 limited role. And the other parts of this process are left to

04:28:36PM 16 the states for them to establish standards and criteria

04:28:39PM 17 specific to their own sovereign interest and needs.

04:28:43PM 18 And as highlighted in the state's briefing and as

04:28:44PM 19 noted by Mr. Swanson, the state retains siting authority over

04:28:48PM 20 the construction of oil pipelines and, more directly, regulates

04:28:52PM 21 oil and natural gas pipeline.

04:28:54PM 22 And Montana, specifically, is in a unique position

04:28:57PM 23 because in undertaking these processes, it must comply with the

04:29:00PM 24 Montana Constitution's right to a clean and healthful

04:29:04PM 25 environment, as well as other statutory mandates.

Now, really quickly, the Byron pipeline, which plaintiffs point to as a purported source of harm, is a good example of the state's role with respect to the Corps's Clean Water Act obligation. In that case, DEQ issued a 401 certification after conducting an independent water quality inquiry consistent with Montana's own water quality standards. DEQ determined that this project, which will help meet the growing demand for power in Montana and the surrounding region, would have no impact on the water quality in the Yellowstone River.

So this independent but related regulatory process allows the State of Montana to have input into federally approved projects that may affect its waters and allows the state to apply its own standards.

Imposing additional requirements on the Corps is duplicative of these efforts and threatens the state's role in this process by feeding to the federal government power that is typically reserved for the states.

And we ask that this Court grant summary judgment in favor of the federal defendants. Thank you.

THE COURT: Thank you, Ms. Smithgall.

All right. Now, Mr. Margolis, brief rebuttal.

And my first question for you, I think you and Mr. Hayes both cited the *Environmental Defense Center v Bureau of Ocean Energy Management* case, the recent Ninth Circuit decision

04:30:27PM 1 regarding the standing analysis. That decision seems to
04:30:31PM 2 address more in-depth manner the ripeness than standing.

04:30:37PM 3 MR. MARGOLIS: It does address ripeness, but the
04:30:40PM 4 decision has pertinence to standing because it talks about what
04:30:44PM 5 needs to be established at the time a programmatic -- a
04:30:48PM 6 procedural injury occurs, at the time the actual procedure is
04:30:52PM 7 violated.

04:30:52PM 8 THE COURT: What are those standards? What needs to
04:30:54PM 9 be --

04:30:54PM 10 MR. MARGOLIS: As the Court there said -- let me find
04:30:58PM 11 this in my notes because I want to make sure. It says that
04:31:01PM 12 "For claims of procedural injury, the need for factual
04:31:03PM 13 development ceases when the alleged procedural violation is
04:31:06PM 14 complete."

04:31:08PM 15 And that's important here because when you are
04:31:10PM 16 talking about a procedural violation for a programmatic action
04:31:14PM 17 that's suppose to occur before project-specific actions occur
04:31:17PM 18 under that program, it's impossible at that stage to identify
04:31:21PM 19 specific program -- projects that are implementing the program.

04:31:24PM 20 But, of course, we then went on to identify some in
04:31:27PM 21 our supplemental standing declarations, meeting the
04:31:31PM 22 requirements of *Summers*. And, in fact, the defendants were
04:31:36PM 23 talking about how the plaintiffs need to identify a specific
04:31:38PM 24 project. Well, we did. That's exactly what we did, even
04:31:41PM 25 though at this stage it's not always possible or even

04:31:47PM 1 necessary, given the -- where we're at, which is that this is a
04:31:51PM 2 need for a programmatic review that's supposed to take place
04:31:56PM 3 before projects are implemented.

04:31:57PM 4 I wanted to address the venue issue real quick. I'll
04:32:00PM 5 try to be quick here without speaking too fast but --

04:32:04PM 6 Venue was clearly waived. They were not taking our
04:32:08PM 7 allegations as true in the complaint. That's an odd way to
04:32:11PM 8 frame it because an answer is supposed to either admit, deny,
04:32:15PM 9 or state that there's not enough information on which to make a
04:32:19PM 10 statement. They didn't say there's not enough information.
04:32:21PM 11 They specifically admitted that venue is proper. They didn't
04:32:25PM 12 even set forth venue in their defenses -- potential defenses in
04:32:29PM 13 their answer. And they didn't preserve their argument.

04:32:32PM 14 At the time their motion for summary judgment was
04:32:35PM 15 filed, the information -- they say that we didn't prove up at
04:32:39PM 16 that time, but we had already filed our summary judgment brief.
04:32:41PM 17 They saw our standing declarations. So the time for raising
04:32:45PM 18 this was in the answer.

04:32:46PM 19 There was a potential time to raise it in their
04:32:48PM 20 motion for summary judgment, which they failed to do. So they
04:32:50PM 21 clearly waived the argument. There's a time to bring a venue
04:32:54PM 22 claim. That time has passed, and the issue has been waived.

04:32:58PM 23 A couple more points: One thing, the government
04:33:04PM 24 agreed that here we have -- the plaintiffs have to do some
04:33:07PM 25 digging to find projects because they don't make

04:33:09PM 1 preconstruction notifications public. And counsel for the
04:33:15PM 2 government specifically talked about how we would need to go
04:33:18PM 3 out there and find these projects out.

04:33:19PM 4 Well, that supports *Havens* standing. That's exactly
04:33:21PM 5 what *Havens* standing is all about. If we have to go out there
04:33:23PM 6 and find these things on our own, that takes away from our
04:33:26PM 7 mission to protect listed species and that provides *Havens*
04:33:30PM 8 organizational standing.

04:33:32PM 9 Another statement was made that there's no evidence
04:33:34PM 10 here of "may affect." The Corps admits that thousands of
04:33:39PM 11 consultations need to take place under Nationwide Permit 12,
04:33:42PM 12 specifically because Nationwide Permit 12 may affect listed
04:33:44PM 13 species. Just because project-specific consultation will occur
04:33:49PM 14 doesn't mean that the program doesn't affect listed species.
04:33:54PM 15 In fact, it proves that the program affects listed species.

04:33:56PM 16 The statement regarding the 2009 *Center* case and the
04:34:00PM 17 *Department of Navy* cases that are somewhat outliers, that talk
04:34:04PM 18 about how project-specific review might be able to replace the
04:34:08PM 19 need for programmatic consultation, well, that has been, if not
04:34:12PM 20 directly overruled, it's completely inconsistent with this
04:34:16PM 21 Circuit's decision in *Conner v Burford*, but, more recently, in
04:34:21PM 22 the *Environmental Defense Center* case where the Court
04:34:25PM 23 specifically said site-specific review cannot cure a failure to
04:34:28PM 24 consult at the programmatic level, citing *Conner v Burford*, the
04:34:32PM 25 exact same case that Your Honor relied on in the previous

04:34:35PM 1 Nationwide Permit 12 case to find that program-level
04:34:38PM 2 consultation does not replace the need -- or the
04:34:41PM 3 project-specific consultation does not replace the need for
04:34:43PM 4 programmatic review.

04:34:45PM 5 A couple other short points: There was a comment
04:34:52PM 6 made that the Pamplico pipeline is not a live controversy.
04:34:58PM 7 That is inconsistent with the statements made in the
04:34:59PM 8 government's reply brief, which specifically says that "The
04:35:02PM 9 Corps is in the process of complying with the ESA for this
04:35:06PM 10 proposal," suggesting that, as we stated, that project does
04:35:09PM 11 have effects on listed species.

04:35:11PM 12 And, again, it doesn't matter that they're complying
04:35:12PM 13 with ESA for that specific project because it is the aggregate
04:35:18PM 14 impacts, the cumulative impacts of all the projects under
04:35:21PM 15 Nationwide Permit 12 that create an effect on listed species
04:35:24PM 16 that needs to be addressed at that programmatic level.

04:35:27PM 17 And then, lastly, this reliance on *National Family*,
04:35:34PM 18 the buffers and other restrictions that were used to make a "no
04:35:37PM 19 effect" determination, that's based on a scientific analysis
04:35:41PM 20 that the actual impacts to species wouldn't occur because of
04:35:48PM 21 the exposure -- the amount of exposure to those species.

04:35:50PM 22 That is not what's going on here. What's going on
04:35:52PM 23 here and what they've tried to say is that they did this
04:35:54PM 24 biological assessment that complied with the procedures of the
04:35:58PM 25 ESA and that they're not relying on future project-specific

1 consultations. That is absolutely not what the biological
2 assessment said.

3 At NWP3596, this is the conclusion of the biological
4 assessment, "The issuance or reissuance of NWPs does not
5 require ESA Section 7 consultation because no activities
6 authorized by any NWPs may affect listed species or designated
7 critical habitat without first completing activity-specific ESA
8 Section 7 consultation.

9 So while they say the Corps was mindful of this
10 Court's order, this shows that it was not. They just
11 reiterated the same exact argument that you rejected in the
12 prior case as the conclusion of their biological assessment.
13 It didn't provide any actual analysis. It just reiterated the
14 same argument that's already been denied, and that's
15 inconsistent with the recent Ninth Circuit decision that we
16 presented in *Environmental Defense Center*.

17 THE COURT: How do you respond to Mr. Howell's
18 argument about the Ninth Circuit case that came down after the
19 *Northern Plains* case?

20 MR. MARGOLIS: First of all, this is the first we're
21 hearing about that. They didn't provide that argument in their
22 briefing.

23 But, regardless, again, it's inconsistent with this
24 Court's decision in *Environmental Defense Center*, which
25 specifically says that "project-specific review cannot replace

1 programmatic consultation." That's now been resolved by the
2 Ninth Circuit.

3 If they said something -- they didn't say anything,
4 that I know of, in the *Nation Family* case that is contrary to
5 that. And now the Court has made clear -- the Ninth Circuit
6 has made clear that that's simply not how the ESA works.

7 THE COURT: Thank you, Mr. Margolis.

8 MR. MARGOLIS: Thank you, Your Honor.

9 THE COURT: All right. So that concludes our
10 arguments. This case is submitted. I'll have an order out
11 forthwith.

12 Thank you for your time, counsel. We'll be in
13 recess.

14 (The proceedings concluded at 4:37 p.m.)

15
16 --o0o--
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 16th day of October, 2022.

/s/ Yvette Heinze

Yvette Heinze
United States Court Reporter